No. 13218.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE and BERNARD V. PROVENZANO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From Judgments of Conviction of the United States District Court, District of Nevada.

OPENING BRIEF OF APPELLANTS.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

PAGE

PAGE

STATUTES

TEXTBOOKS

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OPENING BRIEF OF APPELLANTS.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Appellants, Las Vegas Merchant Plumbers Association, Merchant Plumbers' Exchange, Inc., A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie and Bernard V. Provenzano were indicted, together with Ralph Alsup, for conspiring to suppress and eliminate competition in the sale and distribution of plumbing and heating supplies in Southern Nevada. [Tr. p. 3.]

All of the individual defendants named herein are residents of, and have their principal places of business in, Las Vegas, Nevada. The defendant, Merchants Plumbers Exchange, Inc., is a Nevada corporation with its principal place of business in Las Vegas, Nevada, and the Las Vegas Merchant Plumbers Association is an unincorporated association with its principal place of operation in Las Vegas, Nevada.

The indictment herein alleged that all of said defendants were in violation of Section 1 of the Sherman Act (15 U. S. C. A., Sec. 1). The pertinent portion of the cited Statute provides as follows:

> "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

Motions were made on behalf of all defendants to dismiss the indictment for failure to state facts sufficient to constitute a violation of the Sherman Act, but such motions were denied. [Tr. p. 26.]

A motion for continuance on behalf of all defendants other than defendant Ralph Alsup was made on the ground that counsel for said defendants had been retained for trial only a few days before the trial date and had not had an opportunity to become familiar with the facts of the case [Tr. pp. 39-52], but the motion was denied. [Tr. p. 53.] A motion was made for a transcript of the grand jury proceedings which preceded the bringing of the indictment, but said motion was denied. [Tr. p. 34.]

The matter was tried by a jury at Carson City, Nevada, following which motions were made on behalf of all defendants for judgments of acquittal, which motions were

denied except for the motion as to defendant James Humphrey, which was granted. [Tr. pp. 55-57.] All defendants other than said James Humphrey, were found guilty. [Tr. pp. 146-151.]

This appeal is taken pursuant to Rule 37, Federal Rules of Criminal Procedure, on behalf of appellants herein. Defendant, Ralph Alsup, is appealing from said judgment in a separate appeal.

A motion for a new trial on newly discovered evidence on behalf of appellants herein was made, but this motion was denied by the Trial Court on October 7, 1952. (Supplemental Designation of Record; Stipulation and Order for original papers and proceedings of said new trial motion.)

Statement of the Case.

Appellants were indicted under the Sherman Act, charging a violation of that Act by means of a conspiracy among the defendants to suppress and eliminate competition in plumbing and heating supplies. The indictment alleged, for purposes of Federal jurisdiction, that substantial quantities of plumbing and heating supplies were purchased from out-of-state sources and shipped into Nevada; that such supplies were either shipped directly to plumbing contractors in Nevada, or to wholesalers of plumbing and heating supplies who purchase their materials in response to prior orders placed with them by plumbing contractors, and to whom said supplies are immediately delivered when they are received; that substantial quantities of plumbing and heating supplies are shipped from out-of-state sources directly to the job site where they are installed by plumbing contractors in Nevada; and that appellants are conduits through which

plumbing and heating supplies manufactured in other states move in a continuous and uninterrupted stream to their places of installation within Nevada.

The indictment further charges appellants, together with defendant, Ralph Alsup, of having conspired to establish an organization which would retain a common estimator who would fix prices for use by plumbing contractors; that the price as determined by the common estimator would then be submitted by the particular plumbing contractor to whom the job had been "allocated" by a so-called Allocation Committee which was set up by appellants; that thereafter plumbing contractors, other than the person to whom the job had been so "allocated," would submit higher bids in ostensible competition, and that compliance with this scheme was to be maintained by defendant Ralph Alsup, who would use his position as business agent of the union having jurisdiction over plumbers to induce qualified workmen not to work on any job other than the one which had been "allocated," as aforesaid.

The indictment then charged that the purpose, intent and necessary effect of this combination was to directly, unreasonably, arbitrarily and unlawfully restrain and obstruct the flow of plumbing and heating supplies in interstate commerce into Southern Nevada.

The testimony produced by the Government to sustain the charge of a conspiracy consisted of several persons who, had such conspiracy existed, were admittedly unindicted co-conspirators. None of these witnesses were able to testify from their own knowledge and observation that the so-called "allocation committee" was ever established; the evidence adduced was to the effect that such a commitee was supposed to have been or was "understood to have been" established. [Tr. pp. 560, 823, 939.]

With respect to the issue of adhering to the prices set by a common estimator employed by the Association, each of the Government witnesses testifying as to this issue admitted that there was no compulsion to adhere to such prices and, on the contrary, that the general practice was to submit bids other than those suggested by the common estimator. [Tr. pp. 577, 680, 816, 957-958.]

With respect to the method of enforcing the so-called conspiracy by withholding qualified labor from the plumbing contractor who did not adhere to the alleged conspiracy, all but one of the government witnesses testified that he had never experienced any difficulty in obtaining qualified labor even though he did not adhere to the price suggested by the common estimator. The sole government witness testifying in support of this issue recounted a solitary instance, and grave doubt was cast upon his interpretation and veracity because the facts as related by this witness lent themselves equally well to appellants' interpretation, which involved a dispute between the witness and the union as to the time when the union contract permitted the witness to begin his working day. [Tr. pp. 778, 1086, 1274-1292, 1294-1296.]

The portions of the indictment dealing with the subject of interstate commerce were sought to be substantiated by two groups of witnesses; one group to establish that supplies were shipped from outside of the State of Nevada into the State of Nevada as purchased by plumbing contractors, and one group representing the wholesalers of plumbing and heating supplies.

The witnesses who testified that supplies were purchased by Nevada plumbing contractors from out-of-state sources submitted voluminous exhibits to establish the truth of this claim. None of these witnesses, however, were able to

testify with any certainty as to the duration of time such goods spent on the shelves of the plumbing contractors purchasing these supplies and, in fact, those who ventured a statement with respect to this issue, testified that plumbing and heating supplies, almost without exception, remained on the shelves of plumbing contractors for lengthy and varying periods of time before their final use. [Tr. pp. 476, 584-585, 620, 1074, 1081.]

These witnesses further testified that in every instance plumbing and heating supplies were processed in one way or another and joined together with other such supplies during the process of their installation and prior to their sale, as a completed plumbing or heating unit, to the public. [Tr. pp. 392, 447, 572, 586, 943-944, 1075, 1232.]

With respect to the issue of shipments from out-of-state sources directly to the job site where a particular plumbing contractor installed them on the premises, only two specific items were adduced from government witnesses in contrast to the allegation that "substantial quantities" of plumbing and heating supplies were so distributed. Of these two items one was shipped to the job site for a plumbing contractor who was not a defendant in the action, and the total amount of these shipments amounted to 2% of the sales of the purchases of that particular plumbing contractor for the year in question [Tr. pp. 623-624, Govt. Ex. No. 79], the other shipment for which there was direct testimony was on the order of a plumbing contractor from Los Angeles, California, and an unstated portion of this shipment was made prior to the period of the indictment. [Tr. pp. 994-995, Govt. Ex. No. 4.]

With respect to the witnesses testifying on behalf of wholesalers and plumbing and heating suppliers, two of

such wholesalers were represented. Testimony on behalf of one of said wholesalers casts no light at all upon the issues in the indictment. [Tr. pp. 588-602.] The testimony on behalf of the other wholesaler failed completely to substantiate the indictment since the testimony was that only 7.3% of the total purchases of his company were in response to prior orders from plumbing contractors, and that even with respect to this small percentage an unspecified but substantial percentage was never, in fact, thereafter delivered to the contractor ordering the goods. [Tr. pp. 469, 470, Govt. Ex. No. 38.]

Once again this Government witness also testified that invariably, insofar as his records showed, plumbing and heating supplies from out-of-state sources remained on the shelves of either the wholesaler or the contractor for a substantial length of time. [Tr. pp. 476, 1074.]

The testimony on behalf of appellants with respect to the so-called conspiracy to suppress competition, as alleged in the indictment, was to the effect that an Association had, in fact, been formed by plumbing contractors in Southern Nevada for the purpose of discussion and action for their mutual self-interests in connection with the plumbing and heating business; that an estimator was, in fact, employed by such Association for the mutual benefit of the Association members; that it was the function of such estimator to compute estimates on any job submitted to him for computation and that the results of this computation would be made known to persons interested in bidding for the particular job. [Tr. pp. 1155-1160.]

Appellants' witnesses denied, however, as had the Government witnesses, that there was any compulsion to use the price as fixed by the common estimator and testified that the practice rather was to use such figure as a guide in making their own independent bids which varied from the price suggested by the common estimator in a far greater number of cases than it coincided with such suggested price. [Tr. pp. 1160-1185, 1267-1270.]

It was further appellants' position that there was no continuous and uninterrupted flow of commodities from outside of the State of Nevada to their places of installation and use within the State of Nevada, as alleged in the indictment, but rather that any goods purchased from out-of-state sources remained on either the shelves of plumbing contractors or wholesalers for substantial periods of time, and that such goods were thereafter commingled with other goods before finally being installed. [Tr. p. 1152.] Testimony was further adduced by appellants to indicate that they were not selling plumbing and heating supplies in the form in which they had been imported from out-of-state sources but rather were selling completed plumbing and heating systems to the ultimate consumer, which systems were a combination of many different plumbing and heating items which were fabricated and processed in various ways before being joined into the completed system. [Tr. pp. 1152-1153.]

Specification of Errors.

I.

The Trial Judge erred in denying appellants' motions to dismiss the indictment on the ground that insufficient facts were alleged to state a caues of action under Section 1 of the Sherman Anti-Trust Act.

Motions to dismiss. [Tr. pp. 212-258.] Motions denied. [Tr. p. 316.]

II.

The Trial Court committed prejudicial error in charging the jury that a conspiracy to fix prices standing alone constituted a violation of the Sherman Anti-Trust Act, since there was omitted completely from such charge the requirement that such conspiracy in intent, purpose or necessary effect have some substantial effect upon interstate commerce.

The Trial Court's instructions providing that a conspiracy to fix prices, irrespective of the effect of such conspiracy upon interstate commerce, constitutes a violation of the Sherman Anti-Trust Act, are to be found in Instructions Numbers 18, 19, 20 and 22. [Tr. pp. 122-126.]

Requested instructions on behalf of defendants which were erroneously rejected by the Trial Court dealing with this subject matter are:

Instruction No. 11 [Tr. p. 67];
Instruction No. 12 [Tr. p. 68];
Instruction No. 14 [Tr. pp. 69-70];
Instruction No. 15 [Tr. pp. 71-72];
Instruction No. 18 [Tr. pp. 75-76];
Instruction No. 21 [Tr. pp. 77-78];
Instruction No. 22 [Tr. p. 79];
Instruction No. 55 [Tr. pp. 100-101].

III.

The Trial Judge committed prejudicial error in charging the jury that the fact that movement of commodities in interstate commerce has come to a halt is a completely immaterial factor not to be considered by them.

The instruction which charged the jury that the movement of commodities is an immaterial factor is to be found in Instruction No. 26. [Tr. pp. 130-131.]

Defendants requested certain instructions which would have charged the jury with the fact that plumbing and heating materials having come to rest upon the shelves of contractors or wholesalers was a factor to be considered by the jury in determining whether the goods were in fact in interstate commerce, are to be found in defendants' Requested Instructions Nos. 16, 17, 18, 19 and 21. [Tr. pp. 72-78.]

IV.

The Trial Court committed prejudicial error in omitting from its instructions any reference to the necessity of the jurors finding that the conspiracy alleged must be proved beyond a reasonable doubt to have been in purpose, intent or necessary effect a direct, substantial, unreasonable, arbitrary and unlawfully restrained obstruction of interstate commerce.

A number of instructions were requested by defendants which would have charged the jury with respect to the issues set forth in the above Specification of Error but no such instruction was given. See defendants' Requested

Instruction No. 10 [Tr. pp. 66-67];
Instruction No. 11 [Tr. p. 67];
Instruction No. 12 [Tr. p. 68];
Instruction No. 14 [Tr. pp. 69-70];

Instruction No. 15 [Tr. pp. 71-72];
Instruction No. 17 [Tr. pp. 73-74];
Instruction No. 22 [Tr. p. 79];
Instruction No. 24 [Tr. pp. 80-81];
Instruction No. 25 [Tr. pp. 81-82];
Instruction No. 26 [Tr. pp. 82-83];
Instruction No. 27 [Tr. pp. 83-84];
Instruction No. 52 [Tr. pp. 98-99];
Instruction No. 53 [Tr. pp. 99-100];
Instruction No. 55 [Tr. pp. 100-101].

V.

The Trial Court committed prejudicial error by reason of its failure in its Instructions to the Jury to charge that it was the jurors' function to apply the facts presented to the law as given in ultimately determining whether the alleged conspiracy was in purpose or effect a sufficiently direct and substantial burden upon interstate commerce so as to constitute a violation of the Sherman Act.

Instructions given by the Trial Court which required a finding by the jury of a violation of the Sherman Act upon the finding of certain facts as set forth by the Court are as follows:

Instruction No. 18 [Tr. pp. 122-123];
Instruction No. 20 [Tr. p. 125];
Instruction No. 21 [Tr. pp. 125-126];
Instruction No. 22 [Tr. p. 126];
Instruction No. 23 [Tr. p. 127];
Instruction No. 25 [Tr. pp. 128-130].

VI.

The Trial Court committed prejudicial error in refusing to instruct the jury in any singular particular with respect either to appellants' theory of the case or with respect to the converse of any of the instructions given.

Although nearly all of the defendants' Requested Instructions set forth their theory of the case, all of which were rejected by the Trial Court, the following defendants' Requested Instructions set forth the basic view of the law by appellants:

Instruction No. 10 [Tr. p. 66];
Instruction No. 12 [Tr. p. 68];
Instruction No. 13 [Tr. pp. 68-69];
Instruction No. 16 [Tr. pp. 72-73];
Instruction No. 17 [Tr. pp. 73-74];
Instruction No. 18 [Tr. pp. 75-76];
Instruction No. 19 [Tr. p. 76];
Instruction No. 22 [Tr. p. 79];
Instruction No. 24 [Tr. pp. 80-81];
Instruction No. 25 [Tr. pp. 81-82];
Instruction No. 26 [Tr. pp. 82-83];
Instruction No. 27 [Tr. pp. 83-84];
Instruction No. 53 [Tr. pp. 99-100].

VII.

The evidence does not substantiate the allegations in the indictment with respect to the existence of an interstate flow of commodities, nor is the evidence with respect to interstate commerce sufficient to sustain the judgment.

VIII.

The evidence is insufficient to sustain the allegation in the indictment that a conspiracy to violate the Sherman Anti-Trust Act existed among appellants.

IX.

The Trial Court committed prejudicial error in admitting testimony pertaining to a conspiracy without *prima facie* proof of such conspiracy apart from such co-conspirators' testimony.

X.

The Trial Court committed prejudicial error in stating in the presence of the jury during the course of the trial that the evidence theretofore submitted demonstrated that a conspiracy had been proved.

The remarks of the Trial Court referred to in this Specification of Errors are to be found in the Transcript at pages 537-538 and 764-765.

XI.

The Trial Court committed prejudicial error in instructing the jury with respect to the presumption of innocence.

The instructions given by the Court which erroneously set forth the law with respect to the presumption of innocence are Instructions Numbers 4, 5, 6 and 8. [Tr. pp. 115-117.]

XII.

The United States Attorney was guilty of prejudicial misconduct in his closing argument to the jury in re-

ferring to the nature of the punishment for the offense for which appellants were on trial.

The statements referred to in this Specification of Error are to be found in the Transcript at pages 1450-1451.

XIII.

The United States Attorney committed prejudicial misconduct by referring in his closing remarks to evidence allegedly known by him in his official capacity but which was not introduced into or contained in the record.

The statements referred to in this Specification of Error are to be found in the Transcript at pages 47-48 and 1464-1465.

XIV.

The Trial Court erred in refusing to grant appellants' motion for a continuance.

The motion for continuance was made on the grounds set forth in the Transcript at pages 39-46, but the motion was denied. [Tr. pp. 323-324.]

XV.

The Trial Court committed reversible error by its hostile treatment of appellants' counsel, by its rulings prejudicially in favor of appellee, and by its interference with the full presentation of appellants' defense.

The hostile treatment by the Trial Court which is here specified as error is to be found in the Transcript at pages 682-683, 764-766, and 1032-1033.

Rulings by the Trial Court prejudicially in favor of appellee cited here as Specification of Errors are to be found in the Transcript at pages 535 and 1089-1090.

Limitations by the Trial Court upon the full presentation of appellants' theory of defense as compared with the Trial Court's laxity in permitting the Government to present its theory, which conduct is here cited as Specification of Error, are to be found in the Transcript at pages 424-426 and 427-428.

XVI.

The Trial Court committed reversible error in denying appellants' motion to inspect the Grand Jury Minutes.

The motion to inspect the Grand Jury Minutes was timely made but denied by the Trial Court. [Tr. p. 30.]

XVII.

The Trial Court committed reversible error in denying appellants' motion for new trial upon newly discovered evidence.

ARGUMENT.

I.

The Trial Judge Erred in Denying Appellants' Motions to Dismiss the Indictment on the Ground That Insufficient Facts Were Alleged to State a Cause of Action Under Section I of the Sherman Antitrust Act.

A. The Trial Court Failed to Distinguish Between Intrastate and Interstate Commerce in Denying the Motions to Dismiss the Indictment.

Despite the tremendous expansion which has taken place in recent years in the concept of the jurisdiction of the Federal Government over trade and commerce, the fact still remains that the United States is a Federal system of government. The problem of demarcation between Federal and State autonomy is not an easy one, yet so long as we adhere to our present governmental structure a reasonable and realistic line of separation must always be sought.

> "The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who formed and those who adopted that instrument meant to carve from the general mass of legislative powers then possessed by the states, only such portions as it was thought wise to confer upon the Federal Government; and in others that there should be no uncertainty in respect of what was taken and what was left to national powers of legislation were not aggregated but enumerated—with the result that that which was not embraced by the enumeration re-

mained vested in the states without change or impairment."

Carter v. Carter Coal Company, 298 U. S. 238, 294 (1935).

"It may not any longer be doubted that the power of Congress and the scope of the Sherman Act's coverage 'extends to those activities intrastate which so affect interstate commerce, or the assertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.' It remains true, however, that the distinction between intrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its regulation, regardless of the particular form which the composition may take, which is the test of federal power;' and that the question of whether the effect on interstate commerce is substantial is still a determining one."

Atlantic Company v. Citizens Ice and Cold Storage Company, 178 F. 2d 453 (C. C. A. 5th, 1949) (cert. denied, 339 U. S. 953).

B. It Is Clear From the Indictment on Its Face That Appellant Plumbing Contractors Are Engaged in the Sale, Distribution and Installation of Fabricated Plumbing and Heating Systems Rather Than the Resale or Distribution of Any Specific Item of Plumbing or Heating Supplies.

At the outset of the discussion as to the sufficiency of the indictment it is necessary to know precisely the business activities of defendant plumbing contractors. Naturally all of the averments of the indictment are to be taken as true for the purposes of this point on appeal.

The keystone of the entire indictment is contained in Section 8 under the heading "Definitions," in which it is set forth the definition of the term "plumbing and heating supplies," which is employed over and over again. As there defined, we are to understand that whenever the term "plumbing and heating supplies" appears in the indictment it is deemed to mean "the various commodities which are customarily installed in residential, commercial and other buildings by skilled labor *as a part of plumbing or heating systems . . .*" Unequivocally, therefore, the indictment refers not to dealers in specific items but to persons engaged in the business of fashioning commodities in combination with other commodities, and with the addition of skilled labor, into systems of plumbing and heating facilities.

Section 10 of the indictment under the heading "Definitions" states that the term "plumbing contractors" when used in the indictment shall be deemed to mean those persons who are engaged in the business of distributing, selling, installing, altering and repairing the "plumbing and heating supplies" as theretofore defined.

To bolster the definitions as given and to indicate that this is not a mere chance use of words, the balance of the indictment reveals that wherever the business or activities of appellant plumbing contractors is mentioned, the word "installation" is joined in the conjunctive with the distribution and sale of plumbing and heating commodities. That this is clearly the Government's theory appears in the argument of the United States District Attorney in opposition to the motions to dismiss the indictment, in which he distinguished the business of retail sales from the business activities of appellant plumbing contractors [Tr. p. 264], and in which he referred to

the business activities of appellant contractors as the "installing, fabricating, processing, whatever you want to call it, the completed plumbing system." [Tr. p. 294.]

The question arises at the outset, therefore, as to whether the appellant plumbing contractors, who the indictment claims are in the business of the construction of plumbing and heating systems, are subject to the provisions of the Sherman Act by reason of the specific agreement between them set forth in paragraph 19 of the indictment. Each of the subdivisions contained within that paragraph refers specifically to the activities of the appellant plumbing contractors around the production of the plumbing or heating system for particular jobs. Thus:

> Subdivision A refers to the employment of an "estimator" who shall determine prices for use by contractors in their submission of bids *for the plumbing or heating system;*
>
> Subdivision B refers to the submission of plans to the estimator and his subsequent determination of a price to be charged *for the plumbing or heating system;*
>
> Subdivision C charges the adoption by the appellant plumbing contractors of the said price in submitting a bid *for said plumbing or heating system;*
>
> Subdivision D charges a selection of one of the plumbing contractors as the contractor to submit the lowest bid *for such plumbing or heating system;*
>
> Subdivision E charges that plumbing contractors other than the one so designated would then submit factitious bids setting forth higher prices than those

in the bid of the designated plumbing contractor *for the plumbing or heating system;*

Subdivision F charges that appellant Ralph Alsup, as business representative of the Association of Journeymen Plumbers, would induce qualified plumbers not to work on any job other than the one designated as aforesaid; and

Subdivision G charges that the appellant plumbing contractors would boycott and threaten to boycott wholesalers of plumbing and heating items (as the term wholesalers is defined in paragraph 9 of the indictment) if they sold or offered to sell such items at prices and on terms not agreeable to the appellant plumbing contractors.

A well-known case has already considered the precise problem here set forth, in a long and carefully considered opinion by Judge Yankwich. (*United States v. San Francisco Electrical Contractors Association,* 57 Fed Supp. 57 (S. D. Calif., 1944).) The indictment in that case was also brought under Section I of the Sherman Anti-trust Act, and but for the fact that it referred to electrical contractors rather than plumbing contractors, the allegations were almost identical. The charge was there also made that a system of factitious bids was arrived at and that only members of the Association would be able to find qualified employees for construction jobs. The Trial Judge reviewed carefully cases on interstate commerce which had been decided up to that time and granted the defendants' motions to dismiss the indictment. An important part of the Court's reasoning in so ruling was the fact that the defendants there were engaged not in the sale or distribution of commodities which had reached

them in the flow of interstate commerce, but, rather, that the defendant electrical contractors were in fact engaged in the business of fabricating completed electrical systems which made use of such items, but which represented an aggregated arrangement only after the addition of skill and knowledge to their arrangement.

> "But the contractors *did not sell* electrical supplies to the public or to general contractors. They built what the indictment calls 'electrical systems,' which it defined as 'that combination of electrical equipment by which electric current is carried into and distributed to residences, apartment houses, and other types of buildings within the San Francisco Bay area' . . .
>
> "When [the electrical contractor] bids on a job, he agrees to install an electrical system. His charges are for the completed system. Into the making of his price go electrical articles, cost of the labor of others, his own engineering skill in installing the various parts and combining them into a working whole, his own cost of doing business, and his profit of management.
>
> "In other words, the electrical contractor processes the electrical article, into a combination, which he sells at a price in which enters *as only one of the elements* the price of the article." (57 Fed. Supp. at p. 65.)

It is within the framework of this picture of appellants' business activities that the allegations in the indictment with respect to the interstate shipment of the commodities used by appellants in fabricating the plumbing and heating systems must be viewed.

It is alleged in paragraph 14 of the indictment that appellants purchased more than 40% of all their supplies from out-of-state manufacturers and wholesalers. Paragraph 15 recites that the remainder of their supplies are purchased by appellant contractors from Nevada wholesalers, who in turn purchase their supplies from out-of-state sources; it is further alleged in this paragraph that the said Nevada wholesalers purchased substantial quantities of such supplies from out-of-state sources "in response and pursuant to prior orders placed with said wholesalers by plumbing contractors" and said supplies were immediately delivered to the plumbing contractors who ordered the items.

With respect to the allegations thus made, it is clear that all of the commodities referred to find their destination either in the business establishment of the appellant plumbing contractors or on the shelves of Nevada wholesalers who hold them subject to resale to unspecified plumbing contractors. Under the holding of *United States v. San Francisco Electrical Contractors Association, supra,* there should be no question that these items destined for fabrication and commingling with other items in plumbing and heating systems are not themselves sold by appellant plumbing contractors. Even assuming a specific prior order by a plumbing contractor of specific commodities from an out-of-state manufacturer, the allegations of the indictment contained in paragraph 15 go no further than the plumbing contractor. The indictment is silent so far upon the manner by which any such item ordered by a plumbing contractor finds its way to the ultimate consumer. In view of the fact that an indictment must be read as a whole, giving effect to each part thereof, and even assuming the most favorable view of

the facts for the purpose of testing the sufficiency of this indictment, all such items of plumbing and heating supplies must be joined with others and with the labor of skilled artisans in constructing within a particular job site a completed fabricated functioning plumbing or heating system.

The section of the indictment which comes closest to alleging a direct line between an out-of-state source and an ultimate consumer is that contained in paragraph 16. It is there alleged that substantial quantities of plumbing and heating supplies are shipped directly from out-of-state sources to the "job site or place *where the same are installed* by plumbing contractors in Southern Nevada." Even here, however, the definition of the term "plumbing and heating supplies," plus the specific allegation with respect to installation, once more makes clear the fact that it is not the commodities themselves which are being sold by appellants, but a completed and fabricated system.

If, as has been stated, the distinction between interstate and intrastate activities is to have substance rather than lip-service, a line must somewhere be drawn. Appellants do not urge any mechanical test upon this Court; they do, however, submit that of all of the commercial activities whose relationship to Federal jurisdiction has been considered by legislative or judicial bodies, the generic field of construction and building activities almost uniformly has been considered to be concerned with intrastate commerce. An extensive list of Federal statutes dealing with Federal regulation of wages, hours and working conditions has been collected in a note in 51 *West Virginia Law Quarterly,* 264. It is there pointed out that in almost every instance Congress has either decided or acquiesced in the generally accepted attitude that

those engaged in construction work are not sufficiently connected with interstate commerce to come within the purview of Federal authority, as opposed to state authority.

Once again we emphasize that no mechanical test is here being proposed to the effect that construction workers generally are beyond the scope of Federal regulation, for it is clear that in many areas, notably under the standards laid down in the Fair Labor Standards Act, the nature of the employee's functions may produce a different result. Nevertheless, it is submitted that the basic reason for the tendency to place construction workers under state rather than Federal supervision is because of the feeling that their trade is engaged in the fabrication of buildings and their components, roads, etc., which will not thereafter wander from their site. This same policy underlies the decision of Judge Yankwich quoted above. We submit that it is a position well buttressed by legislative and judicial policy, and in accord with realistic facts of commercial life.

C. The Fact That Appellant Plumbing Contractors Are Essential for the Installation of Plumbing and Heating Items Shipped in Interstate Channels Is Not Sufficient to Bring Appellants Within the Purview of the Sherman Antitrust Act.

Because of the fact that appellant plumbing contractors do not sell to the ultimate consumer the specific item shipped in interstate commerce as set forth at length above, the indictment seeks to bring appellants within the Sherman Act by allegations that they are "an integral part of and necessary to" the interstate shipment of plumbing and heating items. To this end it is alleged in

paragraph 17 of the indictment that the ultimate consumer does not himself ordinarily install plumbing or heating supplies, such work being performed by skilled plumbing contractors.

The issue with respect to this allegation was treated at great length in the leading case of *Hopkins v. United States,* 171 U. S. 578, 43 L. Ed. 290 (1898). The fact situation in that case concerned commercial agents connected with the Kansas City Stock Exchange. The facts indicated that commercial agents in the exchange entered into an association which excluded from that trade all non-members of the Association, and fixed the rates at which their services would be rendered. The argument for the Government in that case, as in the case at bar, was that interstate commerce was burdened by reason of this agreement, because of the fact of price fixing, and that since commercial agents were essential for the interstate shipment of cattle terminating in the Kansas City stock yards, Federal jurisdiction should extend to them, and specifically that the Sherman Act should be held violated. The Court in considering these facts and assuming their proof, rejected this motion, and held that the mere fact of being essential to the interstate movement of goods does not in and of itself bring one within the purview of interstate commerce.

> "For example, cattle, when transported long distances by rail, require rest, food, and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a

> contract, even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell at below a certain price be covered by the Act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? . . . Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the Act because horse blankets are necessary to be put on horses to be sent on long journeys by rail and by reason of the agreement the expense of sending the horses from one state to another for a market might be thereby enhanced? . . . In our opinion all these queries should be answered in the negative." (171 U. S. 593-594, 43 L. Ed. at 296.)

The precise question being considered here was also raised in *United States v. Greater Kansas City Chapter, National Electrical Contractors Association,* 83 Fed. Supp. 147 (W. D. Mo. 1949). The defendants in that action were electrical contractors within the State of Missouri who allegedly had entered into a conspiracy not to provide any skilled labor for the installation of electrical systems unless the owner or builder either purchased the materials from them or paid them a substantial part or all of the profits which the contractors would have received had they sold the materials as well as the labor. In dismissing this indictment the Court held as follows:

> "Assuming that the defendants were indispensable to the installation, etc., of electrical systems in that

> area or community, and, assuming, further, that their refusal to contract with the owners and builders unless they complied with their (defendants') demands, would impede and interfere with the free flow of interstate commerce, yet, under the express ruling of the Supreme Court in *Apex Hosiery v. Leader, et al.,* 310 U. S. 469, loc. cit. 482, 483, 484, 485, 486, 490, 492, 493, 497, 498, 500 and 501, 60 S. Ct. 982, 84 L. ed. 1311, 128 A. L. R. 1044, this would not be sufficient, and they would not be guilty of violating the law." (82 Fed. Supp. 149.)

By the allegation in paragraph 17 of the indictment, that appellant plumbing contractors are essential for the installation and creation of plumbing and heating systems, we are brought but little closer to the conclusion that appellants' business activities in general and the specific conspiracy alleged comes within the purview of the Sherman Act. Patently, in an economy so tightly knit as present-day America, few occupations indeed, if any, can be said to be completely divorced from the use in one way or another of commodities which commence their existence in another state. No decided case of which appellants' counsel are aware has held that the indispensability of the trade standing alone to the consumption of a commodity which has been shipped from another state is sufficient to sustain the basic jurisdiction of the Sherman Act. On the contrary, *Hopkins v. United States,* 171 U. S. 578, is still cited as good law in the most recent United States Supreme Court decisions dealing with the question of interstate commerce under the Sherman Act.

The case of *Hopkins v. United States,* 171 U. S. 578, and the case of *Anderson v. United States,* 171 U. S.

604, of similar import as the *Hopkins* case, were cited with approval in *United States v. National Association of Real Estate Boards,* 339 U. S. 485, 492, 70 S. Ct. 711, 716 (1950), and represent the present law on the question of interstate commerce under the Sherman Act.

In both the *Anderson* and the *Hopkins* cases, the United States Supreme Court considered the remote effect of the activity of the parties in respect to interstate commerce, and rejected the application of the Sherman Act.

This is emphasized in the *National Association of Real Estate Boards* decision by the opinion of Mr. Justice Douglas, page 492, as follows:

> "Hopkins v. United States, 171 U. S. 578 * * * and Anderson v. United States, 171 U. S. 604 * * * are not opposed to this conclusion. It was held in those cases that commission merchants and yard traders on livestock exchanges were not engaged in interstate commerce even though the livestock moved across state lines, *cf.* Stafford v. Wallace, 258 U. S. 495 * * *, and therefore that the rules and agreements between the merchants and traders (which included in the Hopkins case the fixing of minimum fees) did not fall under the ban of the Sherman Act. But we are not confronted with that problem here. As noted, we are concerned here not with interstate commerce but with trade or commerce in the District of Columbia."

Mr. Justice Jackson dissenting at page 496, stated:

> "If real estate brokerage is to be distinguished from the professions or from other labor that is permitted to organize, the Court does not impart any standards for so doing.
>
> "It is certain that those rendering many kinds of service are allowed to combine and fix uniform rates

of pay and conditions of service. This is true of all laborers, who may do so within or without unions and whose unions frequently do include owners of establishments that employ, others, such as automobile sales agencies. See, for example, International Brotherhood of Teamsters, etc. v. Hanke, 339 U. S. 470, 70 S. Ct. 773. I suppose this immunity is not confined to those whose labor is manual and is not lost because the labor performed is professional. The brokerage which is swept under the anti-trust laws by this decision is perhaps a border-line activity. However, the broker furnishes no goods and performs only personal services. Capital assets play no greater part in his service than in that of the lawyer, doctor or office worker. Services of the real estate broker, if not strictly fiduciary, are at least those of a trusted agent and, oftentimes, advisory as to values and procedures. I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the anti-trust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber. I would affirm the decision of the court below."

D. The Allegations in the Indictment With Respect to the Flow of the Plumbing and Heating Items Are Insufficient to Charge a Violation of the Sherman Act.

In line with the Government's attempt to bring appellant plumbing contractors within the Sherman Act, in spite of the fact that their business activities are limited, as the indictment itself sets forth, to the fabrication of plumbing and heating systems rather than the sale of the plumbing and heating items themselves, the indictment goes one step further than that set forth in Subdivision C above and alleges that the "plumbing and

heating supplies flow in a continuous, uninterrupted stream from their points of origin in states other than Nevada, to their places of installation and use in buildings in Southern Nevada." [Indictment par. 17.] This allegation is preceded by one which alleges that appellant plumbing contractors "are conduits through which plumbing and heating supplies" from outside of the state are "sold and distributed to the consuming public in Southern Nevada." [Indictment par. 17.]

This use of language is undoubtedly intended to bring this indictment within the ruling of this Circuit in *United States v. Chrysler Corp. Parts Wholesalers,* 180 F. 2d 557 (C. C. A. 9, 1950). In that case, strikingly similar language was held sufficient to state a cause of action under the Sherman Act. In that indictment it was alleged that the defendants as distributors of Chrysler products imported engines and automotive parts from out of the state in anticipation of and in response to orders and demands from customers within the state. Therefore, it was alleged, the defendants as distributors served as a conduit through which the parts and engines moved "in a regular and continuous and uninterrupted flow to the the ultimate users of the parts and engines within the state" (180 F. 2d at 558). For this reason, it was alleged, the purchase and resale of parts and engines by the defendant distributors "is an integral part of and incidental to the uninterrupted movement (of said parts) in interstate commerce from the (out of state factories) to the ultimate users" of the parts within the state. (180 F. 2d at 558.)

In commenting upon the sufficiency of this indictment, this Court held as follows:

"We conclude that paragraph 10 of the indictment

> contains a sufficient allegation to charge that at least part of the trade restraint by the alleged conspiracy is in interstate commerce. Effect must be given to the allegation that 'replacement parts and engines move in a continuous and uninterrupted flow to the ultimate users of said parts and engines in the State of Washington.' Appellees contended that said allegation is no more than a conclusion of law. Taken with other allegations we think it is a statement of ultimate fact." (18 F. 2d at 559.)

The difference between the indictment there held to be sufficient and the indictment under consideration here points up the deficiency which appellants here urge as a ground for reversal of the Court below. The indictment in the case at bar studiously avoids any reference to an "uninterrupted movement" of goods in interstate commerce to the ultimate consumer. It was this precise formulation which this Court held legitimized the indictment in the *Chrysler* case, since reliance was there placed upon the case of *Walling v. Jackson Paper Company,* 317 U. S. 564, which dealt with the question of the cessation of the interstate flow of goods. The indictment under consideration in this case sets forth with unmistakable clarity that there is in fact a very real interruption in the flow of goods between its out-of-state source and its ultimate use, since the indictment itself specifically limits itself to an alleged conspiracy dealing only with the fabrication of plumbing and heating systems which are the combination of material and labor. Whereas in the *Chrysler* indictment the allegation with respect to the defendants being the "conduit" for the "regular, continuous and uninterrupted flow" was given substance and meaning by the allegations that the defendants purchased from out of state the very items

which they resold to the ultimate consumer within the state, the indictment in the case at bar, while attempting to use the same formula, employs an empty shell without the substance of commercial reality. While, indeed, the indictment in the case at bar seeks to bring itself within the ruling in the *Chrysler* case by alleging that the appellant contractors are conduits through which plumbing and heating supplies are distributed to the consuming public and that said supplies flow in a continuous and uninterrupted stream from out of the state to their place of use, the primary sentence in the paragraph containing these allegations—paragraph 17— indicates this is in fact not so, since ultimate consumers, it is alleged, do not install said supplies, but that this service is performed by a plumbing contractor who employs and supervises skilled labor for this purpose. In fact, the theory and framework of the entire indictment supports this first sentence from the definitions of terms used through the description of the offense charged.

A situation analogous to that presented in the indictment in the *Chrysler* case, when applied to the plumbing industry, would be an indictment against *wholesalers* as that term is defined in paragraph 9 of the indictment, since there also is a business activity concerned with the purchase from out of state of supplies and their sale intrastate. The situation in the indictment in the case at bar, however, when analogized to that in the *Chrysler* case, would be an indictment brought against automobile mechanics engaged in the rebuilding of engines from parts imported from out of state and which rebuilt engines were then offered for sale rather than the individual parts.

II.

The Trial Court Committed Prejudicial Error in Charging the Jury That a Conspiracy to Fix Prices Standing Alone Constituted a Violation of the Sherman Antitrust Act, Since There Was Omitted Completely From Such Charge the Requirement That Such Conspiracy in Intent, Purpose or Necessary Effect Have Some Substantial Effect Upon Interstate Commerce.

Several of the Court's instructions to the jury charged them with respect to that aspect of the indictment which alleged a conspiracy among appellants to fix the prices of plumbing and heating commodities. Notably absent from these instructions is any reference to the concept of a relationship between any such agreement and a substantial effect upon interstate commerce. The balance of the instructions demonstrate that this omission was neither accidental nor cured at some other point in the instructions, as the discussion in succeeding parts of this brief indicate.

Instruction number 18 given by the Court charged the jury that "any combination which by agreement tampers with price structures is engaged in an unlawful activity." [Tr. p. 123.]

Instruction number 19 given by the Court charged the jury that while it is perfectly lawful to use a price service or a price book in the regular course of one's business,

> "when two or more businessmen agree to use the prices contained in a given price book to fix prices, by the mere fact of so agreeing they have abandoned their status as independent competitors and have become engaged in an unlawful combination to fix prices." [Tr. p. 124.]

Instruction number 20 charged the jury that while there was in itself no violation of any law in selecting a common estimator whose services would be made available freely,

> "if you find that it was agreed that a person to be known as an estimator would be employed to fix prices and determine the amount to be bid by plumbing contractors, including defendant plumbing contractors in their submission of estimates or bids for the sale and installation of plumbing and heating supplies or specific jobs, you are instructed that such agreement is in violation of the Sherman Act." [Tr. p. 125.]

Instruction number 22 charged the jury that if they should find that there was in fact an agreement among appellants to fix the prices at which they would distribute and sell plumbing and heating supplies, then irrespective of the quantity of supplies involved such an agreement would be unlawful under the Sherman Act. [Tr. p. 126.]

The view of the law thus presented to the jury by these instructions is an extremely narrow one, dependent not at all upon the effect of the alleged conspiracy to fix prices upon interstate commerce. While ensuing instructions, it is true, refer somewhat more to the movement of goods across state lines than do the instructions referred to above, instructions numbers 18, 19, 20 and 22 by virtue of their number and positive assertions require treatment as a unit. While instructions must be viewed as a whole, it is also necessary to consider the effect upon the jury which four instructions given almost in sequence upon the same subject matter must have had.

The concept of the application of the Sherman Act, as expressed by the Trial Court in these instructions, finds

no support in cases dealing with the question of a conspiracy to fix prices. The most recent United States Supreme Court case which has considered this question in detail is the leading case of *Mandeville Island Farms v. American Crystal Sugar Company,* 334 U. S. 219, 68 S. Ct. 996 (1948). In this case, had the United States Supreme Court adopted the view taken by the Trial Court herein, as reflected by instructions 18, 19, 20 and 22, the decision, instead of requiring a number of pages, could have been delivered in a few paragraphs.

In a decision by Mr. Justice Rutledge, the Court considered the applicability of Sections I and II of the Sherman Act to an amended complaint for treble damages by growers of sugar beets against the sugar refiners having a complete monopoly over the purchase, refining and interstate shipment of the sugar and sugar beets. It was alleged that these refiners entered into an agreement to fix prices and otherwise regulate the conditions of sale and distribution of sugar and sugar beets. Since the case came before the Supreme Court on demurrer there was of course admitted the allegation with respect to the fixing of prices at which the refiners would purchase sugar beets for subsequent refining into sugar and its interstate shipment. Far from disposing of the case by a statement that because there was a conspiracy to fix prices the Sherman Act had been violated, the Supreme Court delivered a detailed and searching analysis of the reasons why this particular conspiracy to fix prices stated a cause of action under the Sherman Act. Again and again throughout the decision the Court refers to the requirement that before the Sherman Act can apply to a price-fixing conspiracy there must be some substantial effect upon interstate commerce.

Reviewing the various decisions which had held the process of manufacture to be a purely local activity and for that reason alone beyond the scope of the Sherman Act, the Court underscored the more recent cases in which a realistic economic point of view was adopted instead of a mechanical one. The real test to be applied, said the Court, was "the practical impeding effect" upon interstate commerce rather than any shibboleth of "production" or "manufacture," "incidental" or "indirect." (334 U. S. at 231, 233.) In the process of determining whether any combination or conspiracy alleged to be in violation of the Sherman Act in fact comes within its proscription, however, the Court indicated with clarity the tests to be applied:

> "The inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process, is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. [Footnote No. 14: In *United States v. Frankfort Distilleries,* 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. ed. 951, we said:
>
> > 'It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the anti-trust laws on the basis of the purely local aims of a combination, insofar as its aims were not modified by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.'
>
> The decisions cited were *Industrial Association of San Francisco v. United States,* 268 U. S. 64, 45 S. Ct. 403, 69 L. ed. 849; *Levering and Garrigues*

Company v. Morrin, 289 U. S. 103, 53 S. Ct. 549, 77 L. ed. 1062; *United Leather Workers v. Herkert and Meisel Trunk Company,* 265 U. S. 457, 44 S. Ct. 623, 68 L. ed. 1104, 33 A. L. R. 566; *cf. Local 167 of International Brotherhood of Teamsters v. United States,* 291 U. S. 293, 297, 54 S. Ct. 396, 398, 78 L. ed. 804; and *United States v. Hutcheson,* 312 U. S. 219, 61 S. Ct. 463, 85 L. ed. 788.] *For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence."* (334 U. S. 234.) (Emphasis added.)

The Court in the *Mandeville* case next turned to a discussion of the same rule of substantial affectation upon interstate commerce from a slightly different perspective. The concept which had been advanced in *United States v. Frankfort Distilleries, supra,* with respect to the test to be applied in determining whether a price-fixing conspiracy came within the purview of the Sherman Act was approved and reiterated and applied to the facts as presented in the amended complaint. This rule as set forth in the *Frankfort Distilleries* case was evolved for a set of facts where the conspiracy was alleged to apply to a price-fixing scheme covering retail sales of liquor within a particular state. The conspiracy in that case not only fixed the retail prices at which liquor was to be sold within the state, but, in addition, governed the type of agreement used in making inter-

state sales and compelled price maintenance contracts for out-of-state producers of alcoholic beverages. The defendants in that case argued alternatively that either they were not covered by the Sherman Act because retail sales were wholly intrastate, or else that the state's power to control liquor traffic made the Sherman Act inapplicable. The Court there, in language later specifically approved in the *Mandeville* case, held as follows:

> "These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which took place within a state. In resolving them, *there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a major program dependent for its success upon activity which affects commerce between the states.* It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-trust laws on the basis of the purely local aims of a combination, insofar as those aims were not modified by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly turn upon interstate commerce." (324 U. S. 297.) (Emphasis added.)

The Court in that case held that although the conspiracy might have dealt as one of its functions with the fixing of the intrastate sales price of liquor, it was essential to the success of this conspiracy that interstate traffic in the commodity be reached and controlled:

> "Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment

reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales. Its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts . . . Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will." (324 U. S. 293, 298.)

The court in the *Mandeville* case adopted a similar line of reasoning with respect to the facts there presented. They held that while the conspiracy to fix prices for the purchase of sugar beets might under some circumstances not then presented to the Court be considered an intrastate activity, under the facts presented by the amended complaint it was clear that the whole basis for this intrastate activity was the subsequent refinement of sugar from the beets and its interstate shipment:

"We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product; or the effects, if any, of such a change in particular situations unlike the one now presented. (Citing in a footnote at this point *Arkadelphia Milling Company v. St. Louis Southwestern Railway Company,* 249 U. S. 134, 39 S. Ct. 237, and *Cloverleaf Butter Company v. Patterson,* 315 U. S. 148, 62 S. Ct. 491). . . . But under the facts characterizing this industry's operation and the tightening of controls in this producing area,

by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed, they permeated the entire structure of the industry in all its phases, intrastate and interstate.

"We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultivation and harvesting, the quantity of beets purchased and rejected, the refining and the distribution of sugar both interstate and local." (334 U. S. 238-239.)

Once again the Court in this case, in a subsequent portion of the opinion, warned that it must not be understood as applying any mechanical rule, as the Trial Court did in the case at bar, with respect to a conspiracy to fix prices:

"We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day." (334 U. S. 244.)

Notably lacking from the Trial Court's instructions with respect to the alleged conspiracy to fix prices in the instant case, are any of the elements referred to above in the leading Supreme Court cases on the subject. The more recent authorities have emphasized that they will

no longer be bound by the older cases which sought to impose artificial legal concepts to economic realities, thereby isolating from Federal jurisdiction a given activity simply because it is "manufacturing" or "processing." The entire emphasis of the recent decisions has been that instead of deciding cases by the use of labels, courts must look to the economic substance beneath them to determine whether or not any given alleged conspiracy in fact has a substantial effect upon interstate commerce and whether any given alleged conspiracy realistically operates wholly within a state, or whether for its very success it is dependent upon reaching beyond state lines.

The instructions cited above in fact are a return to the older technique of deciding a case by the application of a label rather than by a consideration of the economic substance of the facts before it. For by these instructions the jury was charged that a conspiracy to fix prices was without more a violation of the Sherman Act, and the necessary interrelation with the other factors as set forth in the *Mandeville Island* and *Frankfort Distilleries* cases were not included within these instructions for the jury's determination.

III.

The Trial Judge Committed Prejudicial Error in Charging the Jury That the Fact That the Movement of Commodities in Interstate Commerce Has Come to a Halt Is a Completely Immaterial Factor Not to Be Considered by Them.

The Trial Court, in Instruction Number 26, dealt with the subject of goods which had been shipped in interstate commerce coming to rest within the state. The jury was instructed, following the view of the law set forth in the instructions discussed in Point II above, that a violation of the Sherman Act would be proved if there was a conspiracy to fix prices within a state even though "the product originating in interstate commerce may actually have come to rest on the shelf of the 'retailer.' . . . The inquiry seeks the effect upon prices in the market. And if this effect be shown, it matters not that the movement has come to a halt within the state." [Tr. pp. 130-131.]

The use of the word "retailer" in the above instruction may well have been confusing to the jury, in view of the fact that no evidence in the case dealt with the retailing of plumbing and heating supplies. We pass this however, for the more substantial error in this Instruction.

The jury by this Instruction was therefore charged once again that a conspiracy to fix prices alone constitutes a violation of the Sherman Act. To this concept of the law, however, was added the negative idea that the jury should disregard as having no bearing upon their deliberations the question of whether goods originating

from out of state had come to rest within the state. Since a substantial amount of testimony with respect to this matter had gone into the record, as is discussed in Point VIII, *infra,* and since these facts form the basis for a substantial portion of defendants' theory as demonstrated by Defendants' Requested Instructions Numbers 16, 17, 18, 19, 21, the giving of this instruction constituted a substantial and highly prejudicial error if it misstated the prevailing law upon the subject matter. We contend that it does so misstate the law.

As has been indicated in previous portions of this brief, no single test has yet been adopted by the United States Supreme Court to the exclusion of all other tests in determining Federal jurisdiction under the Sherman Act. Some of the current tests have been discussed above. Another of such tests is to be found in the concept that Federal jurisdiction under the Sherman Act cannot be said to extend so far into intrastate activities so as to reach goods which, although they may have originated in interstate commerce, have been removed from the flow of commerce interstate by reason of their having come to rest within the state, either by a process of commingling, delivery to their destination, or other substantially interrupting phenomenon.

Thus in the leading case of *Walling v. Jacksonville Paper Company,* 317 U. S. 564 (1943), the Court considered this test alone in deciding whether there was Federal jurisdiction under the Fair Labor Standards Act. In that case the Court was concerned with the question of whether goods may be said to have been still in interstate commerce when they were shipped from out-of-state

This Court has also had occasion to consider the problem with respect to a closely analogous set of facts in *Foster and Kleiser Company v. Special Site Sign Company,* 85 F. 2d 742 (C. C. A. 9, 1936). In that case this Court was considering a set of instructions given by the Trial Court which did not present to the jury the issue as to whether in fact the commodities shipped across state lines were still within interstate commerce or whether the activities of the defendants were sufficiently connected with interstate commerce. In holding the instructions as there set forth to be erroneous, this Court stated:

> "By these instructions the Court ignored the hiatus which existed between the manufacturer and the transportation of the lithographs, and also between the transportation and the display thereof; the display being essentially local in character after all transportation, local or interstate, had ceased. *Packer Corporation v. State of Utah,* 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643, 79 ALR 546. Under such circumstances, in order to come within the provisions of the anti-trust laws, the effect upon interstate commerce must be direct and not remote, and must be the result of an intent to restrain interstate commerce. *Coronado Coal Company v. United Mines Workers,* 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *Packer Corporation v. State of Utah, supra.* . . . What occurs before transportation and after transportation in interstate commerce is generally within the legislative power of the state and not that of the United States, unless the effect upon interstate commerce is direct. *Schechter Poultry Corporation v. United States, supra.* The Sherman Anti-Trust Act regulating interstate commerce must be construed with refer-

ence to the respective powers of the state and the United States over the business transactions of the people." (85 F. 2d 750.)

To the same effect see:

Industrial Association of San Francsico v. United States, 268 U. S. 64, 79 (1925);

United States v. San Francisco Electrical Contractor's Association, 57 Fed. Supp. 57 (S. D. Cal., 1944);

United States v. French Bauer, 48 Fed. Supp. 260 (W. D. Ohio, 1942) (appeal dismissed 318 U. S. 795);

Ewing-Von Allmen Dairy Company v. C and C Ice Cream Company, 109 F. 2d 898 (C. C. A. 6, 1940).

Thus, the Trial Court effectively removed from the jury by its charge the consideration as to whether the plumbing and heating supplies which may have come from out of state had in fact either come to rest on the shelves of the wholesalers or the appellants themselves under circumstances which, according to the above cited cases, would have removed their interstate character, or because their having been commingled with other goods and used in the fabrication and construction of plumbing and heating systems had also deprived them of their interstate character by reason of the above cited authorities.

That this error was not only not corrected in subsequent instructions, but was in fact compounded, is indicated by Instruction Number 25. [Tr. pp. 128-130.] This instruction purports to be a characterization of the essential

allegations in the indictment. Significant differences, however, point up the view of the law on the subject of interstate commerce held by the trial judge and charged to the jury.

Thus, paragraph 17 of the indictment alleges that appellant plumbing contractors are "conduits through which plumbing and heating supplies" from out of state are distributed to the consuming public in Nevada and that said supplies "flow in a continuous, uninterrupted stream" from out of state to their places of installation and use in Nevada. [Tr. pp. 9-10.] The Court's charge in Instruction Number 25 in characterizing this allegation, however, omits any reference to the flow of supplies in a "continuous, uninterrupted stream" and instead charges simply that the indictment alleges that appellants are "an integral part of and necessary to" the movement in interstate commerce "of plumbing and heating supplies from outside the state to their installation within the state." Thus the Court emphasized that the jury is not to consider whether the goods were interrupted in their interstate movement and underscores its proposition that a violation of the Sherman Act can be found if there has been a conspiracy to fix prices upon goods which at any time or under any circumstances found their way into the state from an out-of-town source.

IV.

The Trial Court Committed Prejudicial Error in Omitting From Its Instructions Any Reference to the Necessity of the Jury's Finding That the Conspiracy Alleged Must Be Proved Beyond a Reasonable Doubt to Have Been in Purpose, Intent or Necessary Effect a Direct, Substantial, Unreasonable, Arbitrary and Unlawful Restraint and Obstruction of Interstate Commerce.

The instructions delivered by the Trial Judge dealing specifically with the nature of the alleged conspiracy for which appellants were tried is significantly lacking in any reference to the purpose, intent and necessary effect of the alleged conspiracy with respect to the character of the restraint upon interstate commerce. This omission is most clearly pointed up when the instructions upon the subject are compared with the indictment which contains at least some reference to this requirement. Thus, paragraph 21 of the indictment charges that "the purpose, intent and necessary effect of the aforesaid combination, and conspiracy, has been and is to directly, unreasonably, arbitrarily and unlawfully restrain and obstruct the flow of plumbing and heating supplies in interstate commerce. . . ." [Tr. p. 12.] In the Court's paraphrase of the indictment contained in Instruction Number 25, however, and in the other instructions dealing with the subject matter of interstate commerce [Instructions Numbers 18 through 26] there is no reference to the requirement that the conspiracy alleged must have any particular ef-

fect whatsoever or any particular purpose or intent whatsoever, so far as interstate commerce is concerned.

That such is not the law has been amply demonstrated in citing from the leading case of *Mandeville Island Farms v. American Crystal Sugar Company, supra.* As there set forth, courts only preliminarily examine the particular conspiracy alleged, and then must pass on to the question of whether, assuming such a conspiracy, there has been any necessary and substantial effect on interstate commerce so as to run afoul of the Sherman Act. Indeed, in that very case the Court cited with approval a line of cases commencing with *Industrial Association of San Francisco v. United States,* 268 U. S. 64, in which, for the very reasons omitted by the Trial Court in its instructions, the particular conspiracies alleged were held not to fall within the purview of the Sherman Act.

Thus, in the *Industrial Association* case the question before the Court was a criminal indictment against a number of associations and individuals who had conspired to fix the conditions for use of building materials in construction within California. Most of the construction materials used were manufactured within the state, but at least one important item, plaster, came from out-of-state sources. In holding that this combination of individuals did not fall by the terms of their conspiracy within the terms of the Sherman Act, the Court stated as follows:

> "Interference with interstate trade was neither desired nor intended. . . . The thing aimed at and sought to be attained was not restraint of the inter-

> state sales or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions." (268 U. S. 77.)

The Court in that case then stated that it was also necessary to go beyond the intent of the conspiracy and determine whether the means adopted substantially affect and unduly obstruct the free flow of interstate commerce. The evidence in that case indicated that because of the conspiracy there were building contractors who were unable to purchase certain materials and therefore would not proceed with their building plans and thus would not order certain out-of-state commodities which they otherwise would have imported. The Court held this to be not the kind of direct and substantial effect upon interstate commerce which made applicable the terms of the Sherman Act.

> "This ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote—precisely such an interference as this Court dealt with in *United Mine Workers v. Coronado Company, supra,* and *United Leather Workers v. Herkert,* 265 U. S. 45." (268 U. S. 80.)

To the same effect see:

Levering and Garrigues Company v. Morrin, 289 U. S. 103, 53 S. Ct. 549 (1933);

National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U. S. 1 (1936);

United States v. Bay Area Painters and Decorators Joint Committee, 49 Fed. Supp. 733 (N. D. Cal., 1943);

Atlantic Company v. Citizens Ice and Coal Storage Company, 178 F. 2d 453 (C. C. A. 5, 1949) (cert. den., 339 U. S. 953);

Albrecht v. Kinsella, 119 F. 2d 1003 (C. C. A. 7, 1941);

Neumann v. Bastian-Blessing Company, 71 Fed. Supp. 803 (E. D. Ill., 1946);

United States v. San Francisco Electrical Contractors Association, 57 Fed. Supp. 57 (S. D. Cal., 1944).

V.

The Trial Court Committed Prejudicial Error by Reason of Its Failure, in Its Instructions to the Jury, to Charge That It Was the Jury's Function to Apply the Facts Presented to the Law as Given in Ultimately Determining Whether the Alleged Conspiracy Was in Purpose or Effect a Sufficiently Direct and Substantial Burden Upon Interstate Commerce so as to Constitute a Violation of the Sherman Act.

As set forth in Point IV above, the Trial Court omitted from its instructions with respect to interstate commerce, the ultimate fact to be determined before a violation of the Sherman Act could be found: Whether the conspiracy alleged was the kind of a conspiracy which because of its purpose and necessary effect directly and substantially burdens the flow of interstate commerce.

The only matters presented to the jury for its determination were whether the matters of facts as set forth in the indictment were true or not. At no time were the ultimate conclusions set forth in the indictment presented to the jury for their determination.

This Court has recently held that such an omission constitutes reversible error. In *Morris v. United States,* 156 F. 2d 525 (C. C. A. 9, 1946) (rehear. den.), this Court had before it a conviction for violating the Emergency Price Control Act. In that case the Trial Court instructed the jury that if they believed that the defendant had in fact performed the acts which were ascribed to him in the indictment, which consisted of the sale of oranges at a particular price above the price ceiling and the wilful falsification of the records of his company in connection with this transaction, that the jury should

find the defendant guilty. The judge did not present to the jury in its instructions the ultimate facts to be determined by them which were set forth in the statute itself. The Court held as follows:

> "If the judge were permitted merely to tell the jury, as was done in this case, that upon the finding of certain facts their verdict would be guilty of the offense charged without acquainting them with the charge, or upon the finding of certain other facts the verdict would be not guilty of the offense charged, the jury would never know whether or not the facts that they found had any relation to the offense charged. *The verdict is not merely a report on the facts; it is a legal decision that the facts laid before them do or do not fit the essential elements of a social proscription, the violation of which entails a penalty.*" (156 F. 2d 531.) (Emphasis added.)

A similar problem and holding is to be found in *United States v. Noble,* 155 F. 2d 315 (C. C. A. 3, 1946). In that case the defendant was convicted under the War Powers Act and the Trial Court failed to instruct with respect to the nature and elements of the offense, relying instead upon the Information, which was sent into the jury room with the jury. On appeal the Government argued that since the Information set out a recital of facts which if true amounted to a violation of the law, it was only necessary to a determination that defendant was guilty of the crime charged that the jury should find the facts as set forth in the Information. The Appellate Court, however, reversed the conviction, holding as follows:

> "If the jury's only duty was by a special verdict to answer interrogatories as to the existence of certain facts and to leave to the judge the application

of the law to the facts thus found, it might have been sufficient merely to give them a copy of the information for their guidance in performing this duty, but the jury in the present case had a much greater duty than this. They were called upon to determine by a general verdict not only whether the defendant did certain acts which he was alleged to have done, but also whether the doing of those acts amounted to the commission of the crime against the United States with which he was charged. In making that determination it was necessary for them to apply the law to the facts as they found them to be. Accordingly, it was essential that they be instructed upon the rules of law which they were to apply, the most fundamental and important of which were the essential elements of the crime charged. It follows that the jury could not have returned an informed general verdict in the absence of instructions by the trial judge as to these essential elements even though they were permitted to consult and study the information." (155 F. 2d at 317-318.)

The procedure erroneously followed in the two cases cited above was also adopted in the instant case. It is not sufficient under the authorities cited for a violation under the Sherman Act to be found that there be a conspiracy to fix prices or to allocate plumbing and heating construction work upon supplies which at some time or another came from out-of-state sources. It is essential that the ultimate fact be present before a conviction can be sustained or an indictment set forth a sufficient showing of Federal jurisdiction: That the activities complained of have a direct and substantial effect upon the flow of goods in interstate commerce in such a manner that the evils at which the Sherman Act are aimed may

be deemed to be present. This ultimate fact, whether stated in the language here employed or in its variations used from time to time by courts in considering Sherman Act violations was never included within these instructions. Thus the Court obtained from the jury and could only obtain from the jury a "report on the facts." The application of these facts to the law as set forth in the Sherman Act was decided in advance by the Trial Court and withheld by him from the jury's deliberations.

VI.

The Trial Court Committed Prejudicial Error in Refusing to Instruct the Jury in Any Single Particular With Respect Either to Appellants' Theory of the Case or With Respect to the Converse of Any of the Instructions Given.

Although a large number of instructions were requested on behalf of appellants, a substantial portion of which dealt with the question of interstate commerce, not one of these instructions was given by the Trial Court. An examination of these instructions (particularly defendants requested Instructions Nos. 10, 12, 13, 16, 17, 18, 19, 22, 24, 25, 26, 27 and 53) indicates that appellants' theory at the time of trial was as follows: Appellants deny the charges with respect to the formation of a conspiracy, the charge with respect to the fixing of prices, the allocation of jobs and the denial of experienced workmen to those contractors not designated by the conspiracy; that even the presence of such a state of facts would not constitute a violation of the Sherman Act; that even assuming that substantial amounts of plumbing and heating items were shipped into Nevada from out-of-state sources, the effect of the alleged agreement

among appellant plumbing contractors in its intent and necessary effect was not such an unreasonable, direct, substantial and immediate restraint of trade and interstate commerce as to constitute a violation of the Sherman Act; and that even assuming that all of the items which went into a completed plumbing and heating system were brought into Nevada from out-of-state sources, the Sherman Act was not applicable because the interstate movement of these goods had become interrupted prior to the effect of the alleged agreement among appellant plumbing contractors because of the fact that such goods normally remained for substantial periods of time upon the shelves of wholesalers and appellant plumbing contractors and because of the fact that such goods were commingled with other goods by the addition of skilled labor into the fabrication and construction of finished plumbing and heating systems.

Although this positon is well substantiated by the cases cited in Points I to V above as a reasonable construction of the present law with respect to the application of the Sherman Antitrust Act, the Trial Judge refused to instruct the jury in accordance with any of these numerous requests. Thus appellants were in effect denied the right to have placed before the jury their view of the evidence and their interpretation of the proof which had been adduced. Such refusal on the part of the Trial Court is prejudicial error.

Little v. United States, 73 F. 2d 861 (C. C. A. 10, 1934);

Jenkins v. United States, 59 F. 2d 2 (C. C. A. 5, 1932) (cert den., 287 U. S. 628);

People v. Gallagher, 107 Cal. App. 425, 290 Pac. 504;

State v. Hughes, 43 N. M. 109, 86 P. 2d 278;

State v. White, 46 Idaho 514, 266 Pac. 415.

Alexander v. State, 66 Okla. Cr. Rep. 5, 89 P. 2d 332.

Along these same lines the Trial Court further committed error by failing to charge the jury conversely to the manner in which the jury was in fact charged. Thus, at no point in the instructions was the negative of the Government's position put forth with respect to any of the substantially deciding issues presented to the jury. As part of the instructions, a criminal defendant is entitled to have the converse of controlling instructions given for his benefit.

Little v. United States, 73 F. 2d 861 (C. C. A. 10, 1934);

Davis v. State, 214 Ala. 273, 107 So. 737;

Smith v. Commissioner, 262 Kan. 6, 89 S. W. 2d 3;

People v. Hoefle, 276 Mich. 426, 267 N. W. 644;

Commonwealth v. Kluska, 333 Pa. 65, 3 A. 2d 398.

VII.

The Evidence Does Not Substantiate the Allegations in the Indictment With Respect to the Existence of an Interstate Flow of Commodities, nor Is the Evidence With Respect to Interstate Commerce Sufficient to Sustain the Judgment.

A. The Evidence Is Insufficient to Establish the Allegation in the Indictment That Plumbing and Heating Supplies Were Purchased in Response to Specific Prior Orders From Appellants.

One of the most important portions of the indictment is contained in Paragraph 15 in the following language:

> "Substantial quantities of plumbing and heating supplies are purchased from out-of-State sources by the said Southern Nevada wholesalers in response and pursuant to prior orders placed with said wholesalers, by plumbing contractors, and upon receipt of said supplies from out-of-State sources said supplies are immediately delivered to plumbing contractors who ordered the same." [Tr. pp. 8-9.]

Only two Southern Nevada wholesalers testified in support of the allegation in the indictment quoted above: representatives from Standard Wholesale Supply and Gordon Wholesale Supply.

It was the testimony of the representative from Standard Wholesale Supply that his company sold approximately 60% of all the plumbing material sold in the Southern Nevada area. With respect to the specific issue of purchases by his company in response to prior orders placed by plumbing contractors, however, it was his testimony that over 90% of all orders were delivered to appellants from the stock of the company, the back

orders comprising only 7.3% of the total. [Tr. p. 469; Govt. Ex. 38.]

With respect to the allegation that upon receipt of merchandise from out-of-state sources the supplies are immediately delivered to the plumbing contractors who ordered the same, it was the testimony of the representative of this company that it was frequently the case that even within this 7.3%, the contractor who had ordered the materials no longer took the goods, having filled his needs either from another supplier or by a substitution. [Tr. p. 470.]

In this company's experience, moreover, the testimony was that the goods purchased from out-of-state normally stayed on the company's shelves for substantial periods of time—some for as long as ten years, although the normal turnover was three to six times per year. [Tr. pp. 476, 1074.]

The representative from Gordon Wholesale Supply, the only other Nevada wholesaler whose testimony was involved in this case, provided no light whatever on this issue. The representative did not know the place of delivery of any of the goods ordered, had no knowledge of the manner of shipment, what was done with the supplies, nor how long they remained on the shelves prior to delivery to the plumbing contracts. [Tr. p. 593.]

No evidence of any kind was adduced with respect to purchases in response to prior orders from plumbing contractors or the delivery to plumbing contractors of any such materials. Thus the record is completely devoid of any substantial evidence to sustain the contention that "substantial quantities" of supplies were purchased by Nevada wholesalers in response to prior orders

of plumbing contractors and that upon receipt of such supplies they were immediately delivered to the ordering contractor. On the contrary, an extremely small percentage was shown to be involved in this matter and, even with respect to this small percentage, the evidence indicates that an even smaller amount in fact was delivered to the plumbing contractor ordering the same. The record with respect to the amount which may be said to be in this category is so indefinite as not to justify a finding that beyond any reasonable doubt this allegation of the indictment was true.

B. The Evidence Is Insufficient to Sustain the Allegation of the Indictment That Substantial Quantities of Supplies Are Shipped From Out-of-state Sources Directly to a Job Site.

Another of the vital allegations in the indictment is contained in Paragraph 16 which reads as follows:

> "Substantial quantities of plumbing and heating supplies are shipped from manufacturers, wholesalers or other sources outside the State of Nevada, directly to the job site or place where the same are installed by plumbing contractors in Southern Nevada." [Tr. p. 9.]

Despite the fact that as demonstrated by the sheer bulk of the exhibits introduced by the Government, a wealth of material was available and was introduced, the record is almost barren of any evidence which would substantiate the quoted portion of the indictment. Not only did the various witnesses on behalf of the Government throw no light upon this subject but their testimony was positive in many instances in denying that materials were sent from out-of-state sources directly to the job

site. [Tr. pp. 368, 370, 371, 388, 389, 390, 392, 404, 431, 446, 584-585, 618-620.]

The record contains two specific items of evidence with respect to this allegation. One of these specific items concerns testimony by the representative of J. M. Ritter Plumbing & Heating Company (which company was not involved as a defendant in this case). The testimony was that there were four items during the indictment period which "appear" to have been delivered directly from out-of-state sources to the job site. [Govt. Ex. 79.] These items total the sum of $1,407.66. [Tr. pp. 623-624; Govt. Ex. 79.] During the same period of time, this representative from the Ritter Company testified, the total amount of outside purchases during the same period was $66,314.19. Thus the particular specific evidence amounts to testimony that for the period of the indictment, 2% of the purchases of the Ritter Company were shipped directly to the job site. *This is the sole testimony involving a specific amount in which any Nevada plumbing contractor was involved, and this contractor was not a defendant.*

The other specific bit of evidence involved a shipment of $42,801.53 worth of materials directly to the job site of the Las Vegas Thoroughbred Racing Association job. Although this amount is specific and the testimony equally specific with respect to its shipment, the plumbing contractor involved was not a Nevada contractor, but was from Los Angeles, California, and the time of shipment was not established as being within the indictment period. [Pltf. Ex. 4; Tr. pp. 994-995.]

Thus the record is completely silent as to any transactions in which any of the appellants were involved which would substantiate the allegation of Paragraph 16

of the indictment. Even apart from appellants, the testimony involves insignifiant amounts of material shipped directly to the job site and contrasts strongly with the evidence that the almost invariable practice in the shipping of plumbing and heating materials was that they were sent directly to the place of business of the plumbing contractor, there to remain for varying lengths of time.

C. The Evidence Is Insufficient to Sustain the Allegation in the Indictment That the Plumbing and Heating Supplies Flowed in a Continuous Uninterrupted Stream Across State Lines to the Place of Installation.

The third vital element of the indictment dealing with the subject of the interstate commerce is to be found in Paragraph 17 of the indictment:

> "Said plumbing and heating supply flowed in a continuous uninterrupted stream from their points of origin in states other than Nevada to their places of installation and use in buildings in Southern Nevada." [Tr. pp. 9, 10.]

The discussion under Subdivision *B* above may well be incorporated at this point, for the evidence with respect to a "continuous, uninterrupted stream" clearly substantiates appellants' position that the stream concept does not reflect the true state of facts. If analogies are to be indulged, the record reveals no continuous moving stream, but rather a series of dams out of which from time to time flow commodities which have been intermingled with other commodities which have remained dammed up for varying periods of time.

Few of the witnesses who testified on behalf of the Government had any knowledge as to the length of time during which the commodities which had commenced their journey from another state reposed on the shelves of plumbing contractors within the State of Nevada or on the shelves of Nevada wholesalers of plumbing and heating supplies. [Tr. pp. 343, 369, 371, 391, 431, 446, 456-457, 477, 584-585, 593-596, 620.]

The few witnesses who hazarded a guess with respect to the "flow" of these materials testified that such materials remained on the shelves of plumbing contractors for substantial and varying lengths of time. [Tr. pp. 476, 584-585, 620, 1074, 1081.]

Thus the allegation with respect to "continuous uninterrupted streams" from out-of-state sources to places of installation is completely without foundation from any evidence in the record. When it is recalled that the test which the jury was required to apply for a conviction was that the evidence convinced them beyond any reasonable doubt that allegations such as this one which go to the heart of the indictment were true, it is apparent at once that the judgment cannot be sustained.

Moreover, the record is replete with uncontradicted testimony both from Government witnesses and appellants that in all instances the plumbing and heating supplies were not installed in the form in which they were received from out-of-state sources. In each instance the supplies, such as valves, fittings, etc., had to be combined with other supplies before they became use-

ful; the various lengths of pipe had to be cut, fitted and treated before installation; the processing of the various plumbing and heating supplies could take place either on the job or in the shop of the plumbing contractor depending upon the nature of the work and the facilities in each contractor's shop. [Tr. pp. 392, 447, 572, 586, 943-944, 1075, 1232.]

Thus the allegation with respect to the movement of the plumbing and heating supplies is completely without foundation in the evidence. Evidence of any substantial nature goes instead to indicate that, except for insignificant instances, plumbing and heating materials purchased from outside the state remained on wholesalers' or plumbing contractors' shelves for various periods of time; that they were then intermingled with other supplies which had remained on the shelves for other varying lengths of time; and that the supplies were finally processed, fabricated, changed and altered into the final plumbing or heating system which constituted the true stock-in-trade of the plumbing contractor. The ultimate consumer thus paid for and received not specific items of plumbing and heating materials but a completed system fabricated by contractors utilizing their years of experience and skill from materials whose time of origin from out-of-state sources was unascertainable as soon as it was mingled with like goods upon the shelves of the wholesalers and contractors.

VIII.

The Evidence Is Insufficient to Sustain the Allegation in the Indictment That a Conspiracy to Violate the Sherman Antitrust Act Existed Among Appellants.

Naturally, the gist of the charge against appellants was a conspiracy among themselves to violate the Sherman Antitrust Act in the manner set forth in the indictment. Without this concert of action there would of course be no crime since it is not the action of any one individual but rather the unified action of several which constitutes the offense. The judgment of *"guilty,"* therefore, necessarily carries with it a finding that such a concert existed. The evidence, however, not only points as strongly in the direction of innocence, but even more, lacks that degree of certainty with respect to the issue of the existence of a conspiracy which would justify a jury of reasonable men in finding that a conspiracy existed beyond any reasonable doubt.

The first witness, Walter Bates, testifying with respect to the alleged conspiracy, set forth in an early point in his testimony the complete theory of the Government: that an association was formed by appellants for the purpose of allocating among its members the various plumbing jobs which became available; that a central estimating bureau would fix a price which the plumber to whom the job was allocated would quote to the prospective customer; that other members of the conspiracy would then submit fictitious higher bids to encourage the customer to accept the bid of the plumber to whom the job had previously been allocated by the association; and that the Labor Union having jurisdiction over plumbers would restrain its membership from working for any

plumbing contractor who did not conform with this arrangement. [Tr. pp. 521-531.]

Despite this testimony, however, he readily admitted, on cross-examination, that no such committee was ever established at any meeting that he attended and that he had no direct knowledge of any such committee other than a general discussion among members of the Association. [Tr. p. 560.]

Another prop supporting the testimony of a conspiracy as alleged was necessarily an agreement that all of the members of the conspiracy would adhere to the price estimate supplied them by the central estimating bureau allegedly established by the association, and Mr. Bates testified that that was the arrangement. [Tr. p. 521.] Yet, on cross-examination, Mr. Bates admitted that there was no obligation to accept the estimate supplied by the central estimator and that each member was free to use his own discretion with respect to the price actually bid for any job. [Tr. p. 577.]

The next Government witness, Jack Swan, was the person employed as the central estimator himself, and his testimony should have established clearly the existence of a conspiracy, as outlined by the indictment. Mr Swan produced his record book which supposedly contained the conclusive proof that the allocation system existed and had been set up—which document, Exhibit 58, was invested with such importance by the United States Attorney that he found it necessary to transform its color from a blue book to a "little black book" to shroud its existence in an aura of villainy. [Tr. p. 1378.] Exhibit 58, Mr. Swan testified, contained a list of the various jobs which the Allocation Committee of the Association

had allocated to one or another members of the Association and the evidence of this allocation was that, although a job listing might contain several names of plumbing contractors, one of these names was circled and it was this person to whom the job had been allocated. [Tr. p. 651.]

Once again, however, the witness completely reversed his testimony on cross-examination and stated that the circle was actually made by him *after* he learned who had obtained the job rather than the person who had been allocated the job in advance. [Tr. p. 675.]

Mr. Swan further destroyed the conspiracy theory of the Government by stating that during the time that the alleged compulsory allocation and price fixing system was in existence, there were many jobs performed by one or another member of the Association which he did not estimate. [Tr. p. 680.]

The next Government witness, Ivan Larkin, further illustrates the diaphanous nature of the evidence relating to the alleged conspiracy. Mr. Larkin was an alleged co-conspirator with appellants, although unindicted, and therefore should have been in a position to give direct testimony with respect to the various elements of the conspiracy. His testimony commenced with a most positive assertion that an allocation committee was in existence during the time that he was a member of the alleged conspiracy. [Tr. p. 803.] Yet, in almost the same breath, Mr. Larkin testified that his knowledge of such committee was not direct but only hearsay since he himself had never attended any meetings of this committee and had no direct observation of its functioning. [Tr. p. 823.]

As an example of the working of the alleged conspiracy, Mr. Larkin testified with respect to a specific instance in which an allocation had been made: The allocation of the "Ward & Ward" job to appellant Jack Hynds. [Tr. p. 807.] Later testimony developed, however, that this job was not performed by anyone, and that no contract for its performance was in existence. [Tr. p. 958.] In fact Government Exhibit 58 reveals that, despite the testimony of Mr. Larkin that all had agreed that Mr. Hynds should have this job, a bid even lower than that of Mr. Hynds was made by Mr. Nay.

Mr. Larkin further destroyed the substantiality of any proof of the conspiracy as alleged in the indictment by stating that there was no compulsion that he knew of requiring him to use the bid obtained by the central estimating bureau which had been set up by the Association. [Tr. p. 816.]

The next Government witness, J. M. Ritter, was another unindicted co-conspirator in the alleged conspiracy. Once again one would expect from such a witness direct and positive evidence with respect to the nature of the conspiracy, the existence of its manifestations and the compulsory qualities alleged. Yet, Mr. Ritter knew only that there was "supposed to be" an Allocation Committee and had no testimony other than such a vague guess to substantiate his opinion. [Tr. p. 939.]

Contrary to the indefinite nature of his testimony with respect to the existence of the conspiracy, however, he testified positively that there was never any interference from the Association or from the Trade Union on any job which he had done [Tr. pp. 957, 958] and in addition that there was no compulsion upon him to follow the

estimate which he received voluntarily from the central estimating bureau. [Tr. p. 957.]

This testimony from Government witnesses was then followed by two of the defendants, Bernard V. Provenzano and James T. Humphrey, the testimony of both of whom was completely consistent with the testimony given by Government witnesses.

Mr. Provenzano testified that not only was there no conpulsion for him to use the price submitted by the central estimating bureau but in fact that he had *never* used the estimates obtained from Mr. Swan on any job which he had bid. [Tr. p. 1160.] This witness gave at some length and detail the differences between the estimates as shown by Mr. Swan in Exhibit 58 and the bids which he, an alleged conspirator, actually made on the various jobs. [Tr. pp. 1178-1185.]

Mr. Humphrey testified that he did in fact receive estimates from Mr. Swan of the central estimating bureau but that of the 63 jobs which he had completed during the indictment period, he received his estimates on only two occasions and did not follow them on any occasion. [Tr. pp. 1268, 1270.]

Thus the entire proof adduced by the Government to substantiate the indictment is to the effect that a central estimating bureau was set up by the Association for the purpose of providing a standard which the various members of the Association might use if they so desired. The evidence also shows that a record was kept by the Association of the plumbing contractor who actually obtained the

job together with some of the bids which had been made by various contractors on these jobs. The Instructions of the Court themselves, moreover, demonstrate that the Government agrees with appellant that no violation of the Sherman Antitrust Act can be spelled out from the existence of such a central estimating bureau or the submission of estimates by such bureau to be used as a guide by members of an association. [Instructions Nos. 19, 20, Rep. Tr. pp. 123, 125.] Yet, not only is the record devoid of any evidence that an allocation committee was in existence or that members of the alleged conspiracy agreed to follow the estimates of the central bureau but the record affirmatively shows that there was a complete lack of compulsion to follow such estimates and, in fact, in the great majority of cases, such estimates were not submitted as the bid at all.

What remains, therefore, in the record is no conspiracy to fix prices by the method outlined in the indictment but a perfectly legitimate trade association which has established a central estimating bureau paid for by members of the Association to obtain a guide for the individual and independent actions of the members of the Association. The evidence with respect to the conspiracy as alleged in the indictment certainly falls far short of that calibre which an appellate court may say could have convinced a jury beyond a reasonable doubt of the existence of a criminal conspiracy.

IX.

The Trial Court Committed Prejudicial Error in Admitting Testimony Pertaining to a Conspiracy Without Prima Facie Proof of Such Conspiracy Apart From Such Co-conspirators' Testimony.

As indicated by the indictment, the charge was one of a conspiracy to violate the Sherman Antitrust Act by the defendant individuals and associations. It is, of course, clear that where the gist of the offense charged is a conspiracy to commit a crime, the conspiracy must be established *aliunde* the testimony of any co-conspirator before such co-conspirator's testimony may be considered by the jury.

Glasser v. United States, 315 U. S. 60, 74-75.

The holding of this case, repeated many other times, finds its rationale in the fact that hearsay testimony given by co-conspirators may be elevated to the level of admissible testimony only if there has first been established a conspiracy and, if in addition, both the defendants and the testifying co-conspirator have been connected with that conspiracy. To expand this exception to the Hearsay Rule would result in a situation in which "* * * hearsay would lift itself by its own boot straps to the level of competent evidence."

Glasser v. United States, 315 U. S. at 75.

The record in the instant case demonstrates clearly the evils which this rule was designed to eliminate. The only testimony contained in the record with respect to an alleged conspiracy is that given by alleged co-conspirators. At no time was evidence offered or introduced to establish the existence of a conspiracy or the connection of defendants with such conspiracy other than the testi-

mony of the alleged co-conspirators. This testimony concerned itself with statements allegedly made by persons at meetings and by which appellants were supposedly bound on the theory that all were part of the same conspiracy. Yet the record is barren of any evidence other than such declarations purportedly made in the presence of some of the appellants to substantiate even partially the existence of any such conspiracy.

While the Trial Court instructed the jury (Instruction No. 14) that the act or declaration of each member of a conspiracy may bind the other members of the conspirators when the existence of such conspiracy has been shown, it is submitted that by the very nature of the charge and the proof in the instant case such a generalized instruction could not have impressed the jury with the rules of law set forth above and thereby eliminated the prejudice suffered by appellants in the admission by the Court and the consideration by the jury of such evidence.

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence all acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is concerned with a hodge-podge of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of the existence of the conspiracy itself. *In other words, a conspiracy often*

is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal v. United States,* 332 U. S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.,* 2 Cir., 167 F. 2d 54." (Mr. Justice Jackson concurring in *Krulewich v. United States,* 336 U. S. 440, 450.) (Emphasis supplied.)

X.

The Trial Court Committed Prejudicial Error in Stating, in the Presence of the Jury During the Course of the Trial, That the Evidence Theretofore Submitted Demonstrated That a Conspiracy Had Been Proved.

At a relatively early point in the trial the Court, in ruling upon the admissibility of certain third party declarations, made the following statement during the direct examination of one of respondent's witnesses, Walter B. Bates:

"Q. And what were the circumstances of your making these bids? A. Well—

Mr. Schullman: Objected to for the reason it is entirely hearsay, immaterial, and not binding on any of the defendants in this case.

The Court: I understand that this was a meeting that took place at this second meeting?

Mr. Howland: No, your Honor, I am not asking anything about a meeting. The question was what were the circumstances under which he submitted bids to this firm of Franklin & Law on certain jobs? It is purely preliminary.

The Court: I think I see the point of your objection. I would say that there has been evidence here tending to show that there is at least a concert here. That is one of the points you have in mind?

Mr. Schullman: Yes.

The Court: There is evidence here showing that there has been—I don't want to use the particular words—but you might say an agreement of some kind, the Association." [Tr. pp. 537-538.]

Shortly thereafter the Trial Judge in effect adopted a statement, made by the United States Attorney, which once again underscored to the jury the acceptance by the Court of the proposition that there had been established a conspiracy among the defendants:

"Q. Do you know to whom the Clark job had been allocated? A. Mr. Ritter told me that Mr. Jacomini—

Mr. Schullman: Objected to as hearsay.

The Court: I think it would be hearsay.

Mr. Howland: If the Court please, if I may suggest, any statement made by Mr. Ritter to his employee, based upon the *prima facie* evidence of a conspiracy that has been adduced heretofore, would be admissible in accordance with the well known exception of the hearsay rule. There is evidence in this record that the first meeting of which we ever heard was in Mr. Ritter's quarters. There is evidence that Mr. Ritter at one time was on the Allocation Committee himself. There is evidence in the record of Mr. Ritter's attendance at other meetings concerning which testimony has been made.

The Court: I recollect that now. Objection overruled. Answer the question." [Tr. pp. 764-765.]

Naturally, the very question at issue in this trial was whether or not an agreement had been arrived at among appellants as charged in the indictment. Appellants earnestly contradicted any such conclusion and much of their evidence was directed toward the disproof of this assertion. The above-quoted statements on the part of the Judge naturally must have influenced the jurors, since it was obviously a judicial determination to establish that there was an agreement among the appellants as alleged in the indictment. Since these statements came at a very early point in the trial, the Trial Judge thus established a framework for the jury's reception of the entire evidence in this case. For this reason a general instruction of the nature given by the Court in Instruction No. 37 could hardly have wiped out the substantial prejudice which had already been created.

An identical situation was presented to a New York court and a closely similar remark by the court was properly held to be sufficient ground for a reversal of a conviction. In that case, *People v. Jackson,* 291 N. Y. 45, 52 N. E. 2d 945, there was a conviction of three individuals on a charge of murder. The prosecution's theory was that there was a conspiracy among three defendants to commit the murder. The following interchange took place at the time of trial:

> "Q. When you saw the three defendants come out of the house and go over from Herkimer Street to Albany Avenue, did you hear something said; yes or no? A. I did.
>
> Q. Tell us what you heard.
>
> Mr. Kopff (counsel for the defendant Mumford): I object to it.

Miss Barnard (counsel for the defendant Green): Objection on the part of John Green.

Mr. Leibowitz (counsel for defendant Jackson): I further object unless the witness can say which one of the defendants said anything.

The Court: I will permit the witness to state what was said by any one of the three. If the statement came from any one of the three I will permit it irrespective as to whether or not he can tell which one said it.

Mr. Leibowitz: I respectfully except.

The Court: On the ground there is a continuing conspiracy at that particular time."

The New York Court of Appeals, in reversing the conviction, obtained under this interchange, held as follows:

"Whether a conspiracy existed among the three defendants to accomplish Eason's death became one of the principal questions of fact to be determined. . . . We cannot say that the jury's finding upon the important question of fact—whether the defendants conspired together to kill Eason—was not influenced by the language of the trial judge, who in his ruling stated that he would permit Bey to testify as to what he heard 'irrespective of whether or not he can tell which one said it . . . on the ground *there is a continuing conspiracy at that particular time.*' We think the words italicized in the ruling last quoted above were prejudicial to the defendants' substantial rights. They related to an important phase of the case. They were spoken by the Court at a critical point in the trial and may well have led to the jury's finding upon a question of fact which was exclusively for its decision." (291 N. Y. 458-459.)

XI.

The Trial Court Committed Prejudicial Error in Instructing the Jury With Respect to the Presumption of Innocence.

Instructions Nos. 4, 5, 6 and 8 concern themselves with the subject matter of the presumption of innocence and the definition of proof of guilt beyond a reasonable doubt.

Instruction No. 4 charges that the "defendants are presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows them to be guilty beyond a reasonable doubt."

Instruction No. 6 charges the jury that the presumption of innocence "is not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime."

Instruction No. 8 charges the jury that "you are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you without it being restated or repeated."

The language of Instruction No. 4, by charging that the presumption of innocence exists during the proceeding "until the evidence introduced" shows guilt beyond a reasonable doubt, robbed appellants of this presumption during every portion of the trial, including the de-

liberations of the jury. The plain wording of this instruction requires the jury to discard the presumption of innocence if at any time during the trial they might feel that the evidence at that point had indicated the defendants to be guilty beyond a reasonable doubt. The instruction as given certainly did not indicate to the jury that during their deliberations in the jury room the presumption of innocence remained in full force and effect. In fact, as a practical matter, the presumption of innocence first comes into play after both sides have rested and the jury has retired. Similar instructions have been held to be error:

> "The Court instructed the jury that 'the law in addition to that presumed all persons innocent of the offense with which they are charged *until such time* as the proof produced by the Government establishes their guilt to the exclusion of a reasonable doubt.' It is difficult to apprehend what interpretation may be placed by the jury upon the phrase 'until such time.' If it carries to the mind the connotation that guilt is established at the conclusion of the government's proof, then the burden of proof has been shifted to the defendant. The presumption of innocence remains throughout the trial, and it may well be that a juror's conviction of guilt upon consideration of the Government's proof alone is either completely shattered or diluted by a reasonable doubt when the defense has had its say." (179 F. 2d 422.)

In *People v. McNamarra,* 94 Cal. 509, 29 Pac. 953, the Court instructed the jury on the question of presumption of innocence as follows: "This defendant, like all

other persons, accused of crime, is presumed to be innocent until his guilt is established to a moral certainty and beyond any reasonable doubt, and this presumption of innocence goes with him all throughout the case, until it is submitted to you." In holding this instruction erroneous the Court commented:

> "The presumption of innocence does not cease upon the submission of the cause to the jury, but operates in favor of the defendant not only during the taking of the testimony, but during the deliberations of the jury, until they have arrived at a verdict." (94 Cal. 514.)
>
> "There is, of course, no question that the presumption of innocence remains with the party on trial until a verdict of guilty is reached. . . . If it ceased prior to that moment, it would be no value to a defendant and would be no more than a mockery and a sham." (*People v. Anderson,* 58 Cal. App. 267, 274, 208 Pac. 324.)

The charge set forth in Instruction No. 6 has likewise been held to be an incorrect statement of the law. In discussing a similiar instruction, the Court in *Gomila v. United States,* 146 F. 2d 372 (C. C. A. 5, 1944), commented as follows:

> "The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the accused. Until guilt is established by such proof the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of

> which is to protect all persons coming before the court charged with crime until the presumption of innocence is overthrown by evidence, establishing guilt beyond a reasonable doubt, and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence." (146 F. 2d at 373.)

Coming after the instructions cited above containing the errors here noted which served to remove from appellants a substantial portion of the guarantees provided by the presumption of innocence, the language of Instruction No. 8 served only to further prejudice appellants' rights. An instruction had already been given defining reasonable doubt and two had already been given upon the presumption of innocence. This additional instruction added to these definitions a weakening of the presumption of innocence and the standard of proof required for conviction. By the terms of this instruction, which seems to modify the requirement that the Government establish guilt beyond a reasonable doubt, the jury was instructed that they might find guilt upon something less than the moral certainty of appellants' guilt.

While no one of these errors may, when standing alone, have been sufficient to have denied substantial rights to appellants, we submit that when taken together the full force and effect of the presumption of innocence and the requirement that the jury find appellants guilty beyond a reasonable doubt was denied appellants in the charges to the jury.

XII.

The United States Attorney Was Guilty of Prejudicial Misconduct in His Closing Argument to the Jury in Referring to the Nature of the Punishment for the Offense for Which Appellants Were on Trial.

The United States Attorney, in his closing remarks to the jury, referred with some emphasis to the nature of the punishment involved in connection with the offense for which appellants were on trial. The purport of the remarks set forth below was obviously an attempt to convey to the jury that they should not regard too seriously a conviction of guilty, since the punishment was really so trivial:

> "As my friend, Mr. Schullman, pointed out this afternoon, the use of the word 'conspiracy' is no crime. The Court will instruct you that in an anti-trust case there is no specific criminal intent necessary. *The offense against the anti-trust laws is not a felony.* But that is not required, what lawyers call criminal intent. You all know that in a murder case it must be proved, not only was the murder committed, but it was committed with malice aforethought. That is not involved here. We have here a statute which more than sixty years ago *Congress enacted to be a misdemeanor. You have many ordinances in your own communities which are misdemeanors. One of the ones which all of us run afoul of most frequently perhaps is overrunning a stoplight with an automobile.* Now it doesn't make any difference whether you went through the *red light* and whether you saw it or didn't or intended to violate the law or didn't, doesn't make any difference. If a law enforcement officer sees you doing it, he gives you a ticket *and you are charged with a misdemeanor,* a violation of an ordinance, which says you should not go through a *red light.*

"The Sherman Act is *simply* an act reserving (*sic*) competition in business where there is an effect upon interstate commerce.

"*It gives a green light* to businessmen who act independently of each other in fair and open competition, *and it gives a red light* to combinations and associations of businessmen who act collectively and in concert to suppress competition of others." (Emphasis added. [Tr. pp. 1450-1451.]

The impact of the quoted words in reducing a charge of criminal conspiracy under the Sherman Act to the status of a traffic violation may well have had a considerable effect upon the jury's determination. Instead of arguing to the jury, as should properly have been done, the Government's view of the evidence in as forceful a manner as he saw fit, the United States Attorney sought to divert the minds of the jury from the seriousness of the charge by an analogy to an experience in the everyday lives of the jurors which is not regarded by most people as a crime. The constant reference in the cited passage to traffic violations, misdemeanors, green and red lights, could only have meant to the jury that the punishment which would be meted out to appellants would be simply a nominal or reasonable fine rather than any serious consequences. In their deliberations the jurors might very well have taken this into consideration to resolve some of their doubts in favor of conviction, where in the absence of such a concept the Government might have been held not to have established its proof beyond a reasonable doubt.

Unfortunately, references to the degree of punishment or sentence involved in a particular case for a particular

defendant by prosecuting attorneys are not novel in criminal law cases. Indeed, it seems almost as though the device is utilized consciously to help bolster a prosecution case otherwise somewhat tenuous. Uniformly, however, courts have held such references to be misconduct and in a substantial number of cases to be prejudicial error.

Thus, in *People v. Klapperich,* 370 Ill. 588, 19 N. E. 2d 579, the State Attorney's closing argument included a reference by him to the possibility of the defendant's being put on probation in the event of a verdict of guilty. The Court held:

> "Neither counsel had any right to argue the effect of the verdict of the jury in those cases where the jury has nothing to do with fixing the punishment. In such cases the statutes as to punishment and probation have no relation to the trial of a criminal case. The effect of the argument of the State's Attorney may well have influenced the jury in arriving at a verdict of guilty. The argument was error." (370 Ill. at 593-594.)

In *Davis v. State,* 200 Ind. 88, 161 N. E. 375, the prosecuting attorney urged the jury in his closing remarks to convict the defendant and argued that if the Trial Court believed a mistake had been made it could grant a new trial and that if the Trial Court did not the defendant had the right to appeal the case to the Supreme Court and to the Governor for a pardon. This was held to be error on the ground that it ". . . transcends the bounds of proper argument and is calculated to induce the jury to disregard their responsibility." (200 Ind. at 111.)

See also to the same effect:

People v. Ramiriz, 1 Cal. 2d 559, 36 P. 2d 628.

XIII.

The United States Attorney Committed Prejudicial Misconduct by Referring in His Closing Remarks to Evidence Allegedly Known by Him in His Official Capacity but Which Was Not Introduced into or Contained in the Record.

The United States Attorney in his closing remarks to the jury saw fit to inform the jury about two incidents which were not a part of the record and which may very well have had a substantial effect upon the jury in their deliberations. It is significant that both of these incidents involved matters which would have come to the United States Attorney in his official capacity and were therefore calculated to cause the jury to give weight to their supposed occurrence.

The first of such incidents was the United States Attorney's reference to the manner in which the indictment brought against the appellants had been initiated. His remarks to the jury were as follows:

> "We are here today because something happened, which happens before any anti-trust prosecution is brought into the court, and that is *a citizen of this State made a complaint. He went to the local office of the Federal Bureau of Investigation and said, 'Here are some facts as I know them. I am not getting a square shake. There is something wrong, there is something rotten in Denmark. Will you look into it for me?'* The Federal Bureau of Investigation, as you all know, does the investigating work for the entire Department of Justice, of which the Anti-Trust Division is only one of five sections. That complaint was investigated, it was processed, went through the Attorney General's office in Wash-

ington, and in due course came to my office in San Francisco, for the reason that my office has jurisdiction over the State of Nevada as well as Northern California, and *that is why we are here today,* not because of Mr. McNeil, not because of political pressure, but because *some citizen complained, complained that he was being deprived of the benefits of free competition in the marketing and distribution of plumbing and heating supplies in the restraint of interstate commerce."* [Tr. pp. 1447-1448.] (Emphasis added.)

The record is completely devoid of the manner in which or the reasons for which the indictment was brought. Certainly an argument which states to the jury that the United States Attorney knows by reason of his office that the indictment was brought because a plain citizen of the State was being squeezed and maltreated by the appellants constitutes a strong prejudicial factor. The vision of a mistreated and harassed honest citizen bringing his woes to the Federal Bureau of Investigation for redress is a colorful and a persuasive argument. It does not, however, constitute a comment upon the evidence of the case nor a portion of any part of the Government's theory of the case. It is rather a naked appeal to the prejudice of the jury and one designed to cause them to give weight to factors other than those which are to be found in the record itself.

The second instance of this kind of misconduct is to be found in the United States Attorney's comments upon a particular exhibit in evidence [Ex. 99]. This exhibit was a particularly important one in that around it revolved the question of the truth of certain testimony given by one of the appellants, Mr. Provenzano. Mr.

Provenzano had testified that he had not submitted a bid on a particular job. [Tr. p. 1252.] A Government witness contradicted this testimony and stated that he did in fact receive a telephone call from Mr. Provenzano making an oral bid on the job and that he had made a written note of this bid. [Tr. pp. 1302-1303.] It was this written note containing bids on the particular job which constituted Exhibit 99. As part of the cross-examination of this Government witness doubt was cast upon his testimony because of the manner in which his signature had been placed at the top of the sheet. No explanation of this signature was given either on direct or redirect examination of this witness. Nevertheless, in his closing remarks to the jury, the United States Attorney made the following statement:

> "Now don't get fooled by his signature at the top. When I got this paper from Mr. Longley some six weeks or more ago, long before I knew Mr. Provenzano would have the temerity to sit here and testify, under oath, that he had made no such bid, simply because it was just a memorandum sheet of paper, I asked Mr. Longley to put his signature on it so he could, at a later date, identify this piece of paper and that is how come the name L. A. Longley on the top side. It is a standard practice of law." [Tr. pp. 1464-1465.]

Citation of authority is not needed for the proposition that it is misconduct for a prosecuting attorney to refer to evidence which is not in the record and particularly to refer to evidence which he represents as being within his own personal knowledge but which has not been made a part of the record.

Such misconduct, however, becomes greatly magnified when it is perpetrated by a United States Attorney with respect to evidence which he claims to have received by virtue of his official position with the United States Government. The awe for an official of the United States Government and the official processes of the United States Department of Justice which citizens of the United States generally feel would cause such testimony to be carefully and seriously considered by the jury when in fact such testimony had no place in the jury room at all.

The commission of two such serious errors by the United States Attorney is a flagrant violation of the edict set forth by the United States Supreme Court in discussing the duties and responsibilities of a United States Attorney:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so, but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States,* 295 U. S. 78, 88.)

XIV.

The Trial Court Erred in Refusing to Grant Appellants' Motion for a Continuance.

Two of appellants' counsel, Alexander Schullman and Richard Richards, were associated for the trial of this action within a very few days of the actual commencement of the trial. This fact was made known to the Trial Judge upon the calling of the case. [Tr. pp. 39-46.] These counsel pointed out to the Trial Court that their familiarity with the case was limited to a few discussions with other of appellants' counsel, and that they had had no opportunity to confer fully with their clients or to research the law in connection with the case. Perhaps the clearest indication of the full extent of the prejudice suffered by appellants because of this denial of the motion for continuance is to be found in an examination of the exhibits submitted on behalf of respondent. Even a casual glance at the exhibits will indicate by their very number and bulk that an attorney would necessarily require many, many days of intensive work before he could acquire that familiarity with their contents that would permit adequate cross-examination and comprehension.

In a case which is built so substantially upon the contents of complex and detailed exhibits, it cannot be said that a defendant will receive adequate representation unless his counsel is permitted full opportunity to examine and digest the evidence which is to be used against him. The Sixth Amendment to the United States Constitution

guarantees to all accused the right to counsel, and this guarantee means effective counsel, which requires the opportunity for counsel to become fully familiar with the case so that an adequate defense can be made.

Powell v. Alabama, 287 U. S. 45 (1932).

The Trial Court's approach to this problem was that, since appellants were already represented by counsel who was familiar with the case, it was not necessary to grant a continuance for the two attorneys named above so that they could become familiar with the case. [Tr. pp. 323-324.] The two named counsel, however, were selected by appellants to try this case and whether other counsel were available or not, appellants had the right to select trial counsel and to expect that the attorneys of their own choice should be permitted the fullest opportunity to prepare themselves for the trial. Failure to permit a continuance under such circumstances, of course, goes to the very heart of appellants' rights to a full and fair trial.

People v. Dunham, 334 Ill. 516, 166 N. E. 97 (1929).

XV.

The Trial Court Committed Reversible Error by Its Hostile Treatment of Appellants' Counsel, by Its Rulings Prejudicially in Favor of Appellee, and by Its Interference With the Full Presentation of Appellants' Defense.

A. The Trial Court Committed Error by Its Hostile Treatment of Appellants' Counsel.

At a number of points throughout the trial, the Trial Judge treated one of the attorneys for appellants, Alexander Schullman, with marked asperity and hostility. This treatment was wholly unprovoked by Mr. Schullman, or any other counsel for appellants, and its total effect must have been to impress upon the jury that the Trial Judge at the very least regarded appellants' counsel with less favor than he did counsel for the Government. Some of these interchanges are set forth at this point:

> "Q. Referring to Defendants' Exhibit B for identification, I would like to read the statement which I asked the witness to identify.
>
> The Court: No, I do not want you to read anything not in evidence.
>
> Mr. Schullman: May I be heard?
>
> The Court: No, the ruling will stand.
>
> Mr. Schullman: Well, your Honor, it is important—
>
> The Court (interceding): Are you going to argue against my ruling?
>
> Mr. Schullman: No, but—
>
> The Court: No, I don't want you to argue with me or I will have to take some drastic steps with you. I will be obliged to do so. I do not want to

do it but I certainly will in a minute. Be quiet—sit down." [Tr. pp. 682-683.]

"Q. Do you know to whom the Clark job had been allocated? A. Mr. Ritter told me that Mr. Jacomini—

Mr. Schullman: Objected to as hearsay.

The Court: I think it would be hearsay.

Mr. Howland: If the court please, if I may suggest, any statement made by Mr. Ritter to his employee based upon the *prima facie* evidence of a conspiracy that has been adduced heretofore, would be admissible in accordance with the well known exception to the hearsay ruling. There is evidence in this record that the first meeting of which we ever heard was in Mr. Ritter's quarters. There is evidence that Mr. Ritter at one time was on the Allocation Committee himself. There is evidence in the record of Mr. Ritter's attendance at other meetings concerning which testimony has been given.

The Court: I recollect that now. Objection overruled. Answer the question.

Mr. Schullman: May I, for the record, since counsel has made a statement on the record in the presence of the jury—

The Court (interceding): I do not want any statements. No. I have ruled.

Mr. Schullman: May I ask permission of the court only for this reason—counsel has made a statement which the jury has heard—

The Court: Request is denied.

Mr. Schullman: I am asking for instructions. Then when counsel for the government makes a statement in the presence of a jury which I think is prejudicial, I cannot answer that, is that your Honor's position? I am asking for instructions from the

court. I will abide by the instructions, but I understand there is a statement made by the government in the presence of the jury which I deem to be prejudicial and inquire when I try to say something —the defendants are presumed to be innocent until the trial is over—I am stopped.

The Court: You are stopped now.

Mr. Schullman: Is that the instruction of the court?

The Court: That is the instruction.

Mr. Schullman: May I state on the record—

The Court: You may sit down. Proceed." [Tr. pp. 764-766.]

"Mr. Schullman: I now move to strike this letter from the record and ask the jury to pay no attention thereto for the following reasons: There is no evidence in the record now by any witness that this letter was ever given to, or mailed to, or received by any defendant.

The Court: Let me ask you a question. This is part of Exhibit 98?

Mr. Schullman: Yes.

The Court: And Exhibit 98 was admitted in evidence?

Mr. Schullman: Yes, Your Honor.

The Court: Therefore the motion to strike will be denied.

Mr. Schullman: May I defend my reasons?

The Court: No. Now please—

Mr. Schullman: Your Honor, I am entitled to under the law—

The Court: We will not proceed any further. The motion is denied.

Mr. Schullman: May I make a motion in the absence of the jury?

The Court: No, sir. Proceed. The motion is denied.

Mr. Schullman: Your Honor, may I ask the court a question?

The Court: No, sir. Sit down, please.

Mr. Schullman: Your Honor, may I be permitted to try this case?

(No response.)" [Tr. pp. 1032-1033.]

Naturally the Trial Judge occupies a position of great influence with the jury and any cue as to his feelings with respect to the conduct and nature of the case is magnified in the average juror's mind far beyond its real importance. The average juror is unfamiliar with legal proceedings, and to him the judge conducting the trial is something in the nature of an Olympian being removed from the partisan approach exhibited by the attorneys, and representing the impartial and all-powerful government. When, therefore, a trial judge demonstrates, as did the Trial Judge in this case, not only an impatience with counsel for one side as against the other, but beyond that, direct and outright hostility, there can be no question but that the jury must have been affected adversely to Appellants. The record can be searched in vain for any similar remarks made to counsel for the United States throughout the trial. A number of hostile utterances, in addition to those cited, are to be found and these taken together with the other examples cited in this Point XII indicate clearly that the trial was not had in the impartial atmosphere to which Appellants were entitled. Naturally the conduct of a trial by a

judge in any but a completely impartial manner renders a conviction reversible.

United States v. Levi, 177 F. 2d 833 (C. C. A. 7, 1949);

Lambert v. United States, 101 F. 2d 960 (C. C. A. 5, 1939);

United States v. Angelo, 153 F. 2d 247 (C. C. A. 3, 1946);

United States v. Andolschek, 142 F. 2d 503 (C. C. A. 2, 1944);

United States v. Minuse, 114 F. 2d 36 (C. C. A. 2, 1940);

Meeks v. United States, 163 F. 2d 598 (C. C. A. 9, 1947).

B. The Trial Court Committed Reversible Error in Rulings Which Exhibited Bias in Favor of Appellee.

Throughout the trial the Trial Court seemingly adopted a different standard with respect to rulings on evidence exhibiting a marked bias in favor of Respondent and against Appellants. Perhaps the clearest demonstration of this bias is to be found in the rulings with respect to motions to strike certain answers. The Court early in the trial laid down the rule for Appellants that he would not permit an objection to a question or a motion to strike unless it was made before the answer went into the record:

"Mr. Schullman: May I now make a motion to strike the questions and answers concerning the conversation between this witness and Mr. Swan and between this witness and Mr. Lott or Mr. and Mrs. Lott, on the ground it is not, and cannot be, binding on any defendants involved here?

The Court: Motion denied.

Mr. Schullman: May I interpose additional objection on the ground it is under the hearsay rule?

The Court: The motion comes too late. The questions had been answered.

Mr. Schullman: Is that the only reason for the denial?

The Court: That is one reason.

Mr. Schullman: I purposely withheld objecting because I wanted him to finish his inquiry.

The Court: The ruling will stand. Unless objections are properly made to questions the answers will not be stricken. In other words, we do not want to sit and listen to answers and then entertain motions to strike later." [Tr. p. 535.]

A few days later, however, the Court applied quite a different standard when it was the government which was seeking to have answers stricken from the record. Indeed, in the following interchange it will be noticed that the Court *on its own initiative* struck answers from the record even without a motion on the part of the government:

"Q. I will ask you whether or not, Mr. McDonald, during the period which is the latter part of the year 1950, wherein Mr. Alsup conducted certain activities with reference to the race track, negotiating contracts with the various master plumbers and plumbing contractors of Las Vegas, Nevada, negotiating wage and labor agreements, whether or not in all of those matters which transpired during that period he was authorized by the Executive Board of the local to take any such action? A. Yes.

Mr. Howland: I will object to that.

The Court: The answer may go out. Objection will be sustained. The answer will be stricken.

Q. Is it necessary, Mr. McDonald, that Mr. Alsup, as business agent, must report from time to time upon all activities taken by him as business agent to the Executive Board, the local? A. Yes, sir.

Mr. Howland: I will object to that, if the court please.

The Court: The answer will be stricken. Objection will be sustained." [Tr. pp. 1089-1090.]

C. The Trial Court Committed Reversible Error in Permitting Government Counsel to Make Statements in the Presence of the Jury With Respect to Their Theory of the Case While Hampering and Limiting the Same Conduct by Appellants' Counsel.

At a number of points in the trial government counsel were permitted to make statements in the presence of the jury which set forth the theory of the prosecution. When Appellants' counsel sought to counter the effect which this must have had upon the jury by a statement of Appellants' theory of the case, they were summarily cut off. When combined with the conduct of the Court set forth in the subdivisions immediately preceding this, the jury could not have helped but be influenced in their deliberations by the prejudicial attitude so clearly shown.

In the interchange cited directly below, perhaps the most important issue in the entire trial was commented upon unfavorably to Appellants by the Trial Judge. As indicated by the briefs on appeal, there is a substantial difference between Appellants' and Respondent's views of what constitutes interstate commerce for purposes of jurisdiction under the Sherman Act. In the quoted por-

tion it will be noted that, whereas the government's position is set forth at length, Appellants were not permitted to set forth their understanding of this issue or their position with respect to it:

"Mr. Howland: We object to this entire cross-examination. The indictment, if the court please, the indictment itself alleges and the government must approve, that these contractors bought these materials and installed them. Now we have to stop somewhere in a case of this complexity and magnitude and we have subpoenaed these suppliers to establish their general course of dealing with some companies by the volume of the business flowing across the State line into the State of Nevada. Now counsel by this line of questioning is endeavoring, I submit, to establish from these witnesses a negative fact, for which the government did not subpoena witnesses, concerning which they were not interrogated on direct examination and it is outside the scope of the purpose for which the government subpoenaed the corporation which employed this gentleman and upon which he was interrogated upon direct.

The Court: I notice this witness and all other witnesses who testified to similar facts, have testified that they had no knowledge of what became of the articles after they were shipped. I do not think there is any use arguing; the question has been answered.

Mr. Schullman: May I state with equal—

The Court (interceding): No, let it stand the way it is. We have heard each one of these witnesses testify he had no knowledge other than what was shown by the records and the records do not

show what was done with any of these articles or supplies after they left his establishment. I think it appears this witness does not know, and does not pretend to know, what became of it. The objection will be sustained.

Mr. Schullman: Your Honor, may I ask permission to now state—

The Court (interceding): No I would rather not have any statements.

Mr. Schullman: I think we are entitled to show our side of the case, Your Honor. May I have some statement on the side with counsel? I merely want to show a statement made by the government's attornew, which indicates we have no right to show our side of the case. I want merely to show that we do have a right.

The Court: Proceed: There is nothing before the Court now." [Tr. pp. 424-426.]

An interchange between Court and counsel which had the same import as that cited above has already been quoted at page 91 of this brief in which the Court in effect adopted the theory of the case set forth by the prosecution and not only rejected the defense's theory but even denied the right to present that theory to the jury in a manner similar to that which had just been utilized by the prosecution.

An interchange of a somewhat different character, quoted below, indicates that at an early point in the trial the Court not only had adopted the theory of the prosecution with respect to the nature of interstate commerce but in effect ridiculed the position taken by Appellants with respect to this issue. As indicated by the preceding

portions of this brief, it is on this appeal, and was at the time of trial, Appellants' contention that in order to justify a finding that Appellants were engaged in interstate commerce, it is necessary that there be substantial evidence showing a continuous flow of commodities across state lines to the ultimate user, and that the alleged acts of Appellants had a substantial and direct effect upon this continuous flow. It was the government's position at the time of trial that a sufficient showing on the issue of interstate commerce could be made by introducing documentary evidence and testimony to prove that Appellants had purchased goods across state lines, and had subsequently installed these goods within the State of Nevada without regard to the length of time elapsing between the purchase and the installation and without regard to any difference in form with respect to these goods.

Pursuant to this theory held by the prosecution, therefore, the government's *prima facie* case with respect to interstate commerce consisted largely of witnesses and documents designed to prove that Appellants had purchased a great majority of their plumbing and heating supplies outside of the State of Nevada. Consistent with their conception of interstate commerce on the other hand, Appellants' counsel at the trial sought to demonstrate to the jury that these goods, while purchased initially from outside the State of Nevada, had come to rest for long periods of time on the shelves either of Appellants or of wholesalers within the State of Nevada; that in an inconsequential number of cases were the goods shipped directly to the job site; and that, in any event, the goods as finally installed were fabricated and

changed substantially from their form upon importation from outside the state.

The Trial Judge made the following disparaging remarks with respect to Appellants' theory of interstate commerce as they sought to show it at the trial.

> "The Court: I think counsel can stipulate to that. I think all these witnesses have testified, these gentlemen who brought these records in here, that all they knew about any of this material was what was disclosed by the records and the records do not disclose what was done with the material, so why should we ask the question because if you are permitted to ask, you can ask it of every witness and get the same answer. Isn't it obvious the custodian of these records doesn't know what became of the material? I think it would be admitted that this witness does not know what became of any of this material after it left the establishment.
>
> Mr. Schullman: And we have, of course, asked for the exclusion of the documents and evidence, and of course they were admitted and I think this testimony—
>
> The Court (interceding): Why burden the record when this witness doesn't know anything about what was done with any of these materials? I think it is true, Mr. Howland, that, so far as the examination of all these witnesses who have come from these different wholesale houses, they have indicated that all they know is what is contained in the record." [Tr. 427-428.]

XVI.

The Trial Court Committed Reversible Error in Denying Appellants' Motion to Inspect Grand Jury Minutes.

During the trial, a number of references was made by counsel for Respondent to the effect that a grand jury investigation had been conducted into Appellants' activities prior to the indictment. Numerous references were made to testimony given and documents introduced during those proceedings. [Tr. pp. 490-492, 496-498, 502, 511, 524, 710-711.] For this reason counsel for Appellants moved to inspect the minutes of the Grand Jury proceedings. The motion was denied. [Tr. p. 30.]

An example of the prejudice suffered by Appellants because of the refusal to permit an inspection of the Grand Jury minutes is to be found in the quotation given below. It will be noted that the Trial Judge was willing to accept the accuracy of government counsel's characterization of what had taken place before the Grand Jury, which characterization was given in the presence of the jury, when in fact, as later statements indicated, the characterization was not an accurate one:

> "The Court: We had a statement yesterday—I do not know whether that is the situation in regard to this witness or not. Mr. Howland stated something of the scope of testimony before the Grand Jury. Is that the same situation?
>
> Mr. Howland: Yes, Your Honor.
>
> The Court: The individual merely appeared before the Grand Jury stated his position and identified the books and records.
>
> Mr. Howland: That is correct.

Mr. Schullman: We don't know. We were not there.

The Court: That is Mr. Howland's statement. So the objection is overruled. . . .

Mr. Howland: I now call upon the defendant, Merchant Plumbers Exchange, Inc. to produce certain original records which I might say, Your Honor, are at the present time under impounding order of the court having *first been introduced before the Grand Jury last March.*

Mr. Schullman: Your Honor, with the exception of the motion heretofore made in response to the request of the United Plumbing & Heating Company, without repeating this objection, we will make the same objections, subject to whatsoever ruling the court may make.

The Court: This is the same situation as to the scope of the testimony before the Grand Jury?

Mr. Howland: Yes, sir.

The Court: And the records and documents were presented by an officer of the corporation?

Mr. Howland: *In this particular case they were produced before the Grand Jury by Mr. A. R. Ruppert who was at that time Secretary-Treasurer of the Exchange.*

The Court: Objection overruled and the order will be that they be produced here.

Mr. Schullman: Your Honor, there is a serious question about this. I am advised that neither Mr. Ruppert nor Mr. Provenzeno did produce these at the Grand Jury. . . .

Mr. Howland: I would like to make this statement, if I may, for counsel's benefit. The request

for the incorporation minutes of the organizational meeting and the by-laws were all produced subsequent to the first meeting of the Grand Jury. At that time they could not be located. Subsequently it developed that they were in the law office of Mr. William Coulthard.

Mr. Schullman: Then it was not the testimony at the Grand Jury.

Mr. Howland: No. I said these documents were subject to the impounding order of this court. With the exception of the minutes and the by-laws, they were presented to the Grand Jury and produced by Mr. Ruppert." [Tr. pp. 492, 493, 496, 498.] (Emphasis supplied.)

The interchange quoted above demonstrates the wisdom of the large number of cases which hold that it is perfectly proper to require the government to produce grand jury minutes where there is no particular purpose to be served by secrecy. Particularly where it is the government itself which is making public what transpired in the grand jury proceedings, as was done in the instant case, the reason for secrecy vanishes.

> "The virtue of secrecy is not so imprisoning as to defeat justice nor does it lift itself for one side and then reassert its exclusiveness as against efforts of the other side to determine whether the use by one side is accurate. In other words, the government having disclosed a part may not now deny the defendant the right to determine whether that part so disclosed has been accurately disclosed, or whether its disclosure is partial and unfair."
>
> *United States v. Byoir,* 58 Fed. Supp. 273, 274 (N. D. Tex. 1945).

To the same effect, see:

United States v. Socony Vacuum Oil Co., 310 U. S. 150;

Metzler v. United States, 64 F. 2d 203 (C. C. A. 9, 1933);

Schmidt v. United States, 115 F. 2d 394 (C. C. A. 6, 1940);

United States v. Alper, 156 F. 2d 222 (C. C. A. 2. 1946).

XVII.

The Trial Court Committed Reversible Error in Denying Appellants' Motion for New Trial Upon Newly Discovered Evidence.

The trial before the District Court in the above matter was completely terminated, sentence imposed and Notice of Appeal effectuated on November 8, 1951.

On or about July 18, 1952, in behalf of Appellants in this matter, a Motion for New Trial Upon Newly Discovered Evidence was filed with the District Court and hearing thereon was set for October 7, 1952. On that day, his Honor Roger Foley, Judge of the United States District Court, for the District of Nevada, denied the Motion for New Trial Upon Newly Discovered Evidence and thereupon Appellants filed a Supplemental Designation of Record, so that all pleadings and proceedings in respect to such Motion for New Trial are part of this appeal.

In support of the Motion for New Trial, there was filed in the District Court the Affidavit of John W. Bonner, Counsel for Appellant, Ralph Alsup, together with the Affidavit of Richard Richards, one of Counsel for the remaining Appellants.

The Affidavit of John W. Bonner set forth the nature of the newly discovered evidence. This was clearly set forth in said Affidavit and the Exhibits A to J, inclusive, attached thereto. The exhibits were criminal complaints against certain officials of the Las Vegas Thoroughbred Racing Association, the date of filing ranging from November 21 to November 24, 1951; and in addition, there was set forth a copy of the petition of the bankruptcy proceedings filed by the stockholders of the Las Vegas Thoroughbred Racing Association on *March 25, 1952.*

The Affidavit of Richard Richards analyzed the testimony at the trial and set forth the basis for the granting of the new trial by the Court. In essence, said Affidavit and the Points and Authorities in Support of the Motion for New Trial filed concurrently with said Affidavit, established that thirteen witnesses during the trial had testified at considerable length concerning the race track, and that their testimony covered approximately two hundred thirty pages of testimony.

It was and is contended by Appellants that all of said testimony (compounded by additional arguments by Counsel at the trial in respect to the race track) raised strong and erroneous conclusions in the minds of the jury deciding the fate of the Appellants in this case.

The Affidavit of Richard Richards, in urging the granting of the new trial, exhibited the blocking by the Court or by Government Counsel of the attempts made by Counsel for Appellants to clarify the issues respecting the race track.

It was and is the contention of the Appellants that the injection at great length of this race track issue and the erroneous conclusions and inferences raised by

the Government that the inability to complete the plumbing jobs thereon, and the long shut-down of work on the race track, were due exclusively to the fault or on account of the Appellants, by reason of the alleged conspiracy, was highly prejudicial. It was urged and suggested by such testimony of the witnesses who discussed the race track, and Government Counsel's examination of them, that a strike was caused by the plumbers purportedly in pursuance of the alleged conspiracy and, as a result, work was shut down.

Examples, as set forth in said Affidavit of Richard Richards, concerning such testimony are as follows:

(a) Mr. Burns, a Government witness [commencing Tr. p. 875], was entirely concerned with the race track and the issues connected therewith. During cross-examination of Mr. Burns, the alleged strike of labor at the race track was discussed and the inference was presented to the jury that the strike was due to or in connection with alleged machinations of the Appellants then on trial.

Mr. Schullman asked [Tr. p. 898]: "Isn't it a fact that the race track ran into difficulties with money?" The answer given was negative in effect, and emphasis was again placed upon the strike and inferences again drawn adverse to Appellants.

(b) Mr. Schullman again attempted to bring out the fact of the then existing difficulties with the S. E. C. [Tr. p. 899.] This was objected to by Government Counsel and the Court sustained the objection, effectively blocking any testimony or information reaching the jury on this subject.

(c) Again, in respect to the testimony of Mr. Burns, Government Counsel on direct examination

went deeply into the problems and inferences involving the race track, and asked [Tr. p. 886]: "Did there come a time when the entire race track job was shut down by a strike?"

Thus, the Government was able to establish a clear inference, even though in error, as it appears upon the newly discovered evidence, that there was a connection between the alleged strike and the activity of Appellants.

It appears, therefore, that the Appellants have specific evidence which would be offered at a new trial. The difficulties confronting the construction and operation of the race track were difficulties caused by a lack of funds and by the machinations of certain individuals in no way connected with the Appellants herein. Such newly discovered evidence corroborates the position of the Appellants taken or attempted to be taken at the trial, and presents new and definite evidence on the overall subject, of which the jury should have the benefit in order to determine the essential issue of reasonable doubt concerning the alleged guilt of Appellants herein—it being the position of the Appellants that with such evidence before them, the jury would reach a decision of acquittal in this case.

(d) Again [Tr. p. 1001], in the course of the examination of Mr. Sylvester, a Government witness, Mr. Schullman made an offer of proof in which he pointed out the then current indefinite and vague status of the record in regard to the important matters being discussed and involving the race track issue and the status of the stockholders, and requested that the defendants be permitted to go into all

the facts relating to the race track. This offer of proof was rejected.

It is urged that the factual and legal essentials requisite to the granting of a new trial on newly discovered evidence were presented to the Trial Court on Appellants' Motion for New Trial, and the Trial Court should have granted the same.

It is clear that:

1. The evidence offered in the Motion for New Trial was actually newly discovered evidence and was unknown to Defendants at the time of the trial. This is clearly set forth in the Affidavit of John W. Bonner and the Exhibits A to J, inclusive, attached thereto, all of which occurred after the conclusion of the case in the District Court. The criminal complaints referred to in said Affidavit of John W. Bonner range from November 21, to 24, 1951, and the bankruptcy proceedings [Ex. J. of said Affidavit] was not filed *until March 25, 1952.*

Accordingly, the first requisite for the granting of such a Motion has been complied with.

Fogel v. United States, 167 F. 2d 763 (C. C. A. 5, 1948);

United States v. Johnson, 142 F. 2d 588 (C. C. A. 7, 1944);

Paddy v. United States, 143 F. 2d 847 (C. C. A. 9, 1944).

2. The evidence proffered, as set forth in the Affidavits of John W. Bonner and Richard Richards, was not merely cumulative or impeaching, but was material and basic, since the presentation of such testimony on a new trial would have caused the jury to arrive at the

only possible conclusion, and that is, that there was no conspiracy to violate the Sherman Antitrust Act. As the trial was actually conducted, however, the evidence, in bulk, proffered by the Government related to the race track, and without this newly discovered evidence the jury could conclude and did conclude that the alleged conspiracy must have existed and did prevent the completion of the plumbing jobs on the race track.

It is our contention that the newly discovered evidence is so material that it would *probably produce* a different verdict if a new trial were granted, because certainly the entire complexion and bases of the Government's case as a whole would be changed.

3. Such newly discovered evidence would probably produce an acquittal.

> *United States v. Colangelo,* 27 Fed. Supp. 921;
>
> *Arbuckle v. United States,* 146 F. 2d 657.

More importantly, such evidence would probably require the District Court on a Motion for Judgment of Acquittal to grant the same.

The rule of law, followed in this Circuit in respect to the elements required upon considering a Motion for Directed Verdict of Acquittal, is that enunciated in

> *Curley v. United States,* 160 F. 2d 229 (1947), cert den. 331 U. S. 837.

To the same effect, see:

> *United States v. Gardner,* 171 F. 2d 753 (C. C. A. 7, 1948);
>
> *United States v. Central Supply Assn.,* 6 F. R. D. 526 (D. C., N. D. Ohio, 1947);
>
> *United States v. Cole,* 90 Fed. Supp. 147 (1950).

These cases have adopted the rule as enunciated in the *Curley* case in which the Court stated:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty." (160 F. 2d at pp. 232-233.)

It is seriously submitted in this case that the newly discovered evidence if presented either to the jury or the judge, particularly since the case depends upon circumstantial evidence, would result in an acquittal.

4. The failure to learn of the evidence was due to no lack of diligence on the part of Defendants and Appellants.

This is apparent from what has been said before, since the criminal charges and the bankruptcy proceedings were subsequent to the conclusion of the trial.

Coates v. United States, 174 F. 2d 959.

Conclusion.

In view of the foregoing, Appellants respectfully urge that this record on appeal requires either of the following alternatives:

1. That this Court reverse the judgments of conviction, or

2. That this court reverse the judgments of conviction and reverse the order denying a new trial and remand the cause for such new trial in conformity with its judgment.

Respectfully submitted,

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